IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1053

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
Petitioner,

vs.

THE RATH PACKING COMPANY, a corporation,
Respondent.

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures,
Petitioner,

vs.

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Joseph W. Jones, as Director of the County of Riverside, California, Department of Weights and Measures, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in each of the above-entitled proceedings on October 29, 1975. The two cases involve closely related questions, and accordingly petitioner is employing a single petition

for writ of certiorari covering both cases, in accordance with Rule 23(j) 5 of the Rules of this Court. The cases were consolidated by the Court of Appeals for oral argument. For convenience of expression, petitioner Joseph W. Jones, who is the petitioner in both cases, will hereafter be referred to as Jones; respondent, The Rath Packing Company, will be referred to as Rath; and respondents General Mills, Inc., *et al.*, will at times be referred to as the millers.[1]

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[1]Concurrently herewith L. T. Wallace [successor to C. B. Christensen] as Director of Food and Agriculture of the State of California, and M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, are filing a petition for a writ of certiorari. The following business and farm organizations and government officers have authorized counsel for Petitioner Jones to advise the court that they support the filing of this Petition because of their concern as to the effect of the decisions of the court below.

Business and Farm Organizations

National Association of Retail Grocers of the United States, Inc., Oak Brook, Illinois
Scale Manufacturers Association, Inc., Washington, D.C.
California Cattlemen's Association, Sacramento, California
Associated Milk Producers, Inc., San Antonio, Texas
Mid-America Dairymen, Inc., Springfield, Missouri
Milk Producers Council, Ontario, California
Western Dairymen's Association, Merced, California
Federated Dairymen, Merced, California
Associated Dairymen, Lodi, California
League of California Milk Producers, Sacramento, California
Consumers Cooperative of Berkeley, Inc., Richmond, California

Government Officers

W. Michael Gillette, Solicitor General, State of Oregon
Kenneth H. Leach, District Attorney, Butte County, California
Noble Sprunger, County Counsel, El Dorado County, California
Douglas J. Maloney, County Counsel, Marin County, California
Bartley C. Williams, District Attorney, Yuba County, California
Donald N. Stahl, District Attorney, Stanislaus County, California
Edward F. Buckner, County Counsel, Sutter County, California
Robert A. Rehberg, County Counsel, Shasta County, California
Ted Hansen, District Attorney, Sutter County, California
Stephen Dietrich, County Counsel, Tuolumne County, California
Calvin E. Baldwin, County Counsel, Tulare County, California

Opinions Below.

The opinions of the Court of Appeals, not yet reported, appear in the Appendix, beginning at p. 1. The opinion of the United States District Court for the Central District of California in the *Rath* case is reported at 357 F.Supp. 529, Appendix, p. 57. The unreported Memorandum Opinion and Order of the District Court dated September 17, 1973, in the case of *General Mills, Inc., et al.*, appears in the Appendix, beginning at p. 53.

John K. Van de Kamp, District Attorney, Los Angeles County, California
C. Stanley Trom, District Attorney, Ventura County, California
Stanley M. Roden, District Attorney, Santa Barbara County, California
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Jay W. Powell, District Attorney, Tulare County, California
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Albert M. Leddy, District Attorney, Kern County, California
James M. Cramer, District Attorney, San Bernardino County, California
Cecil Hicks, District Attorney, Orange County, California
William A. Smith, District Attorney, Fresno County, California
Robert W. Weir, District Attorney, Del Norte County, California
James D. Boitano, District Attorney, Napa County, California
Robert W. Baker, District Attorney, Shasta County, California
Kenneth H. Leach, District Attorney, Butte County, California
Henry J. Goff, Jr., District Attorney, Tehama County, California
Joseph Freitas, Jr., District Attorney, San Francisco, California
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Gene L. Tunney, District Attorney, Sonoma County, California
Terrence M. Finney, District Attorney, El Dorado County, California
Joseph H. Baker, District Attorney, San Joaquin County, California
Ronald L. MacMillen, District Attorney, Nevada County, California
Guy E. Reynolds, District Attorney, Amador County, California
Harold L. Abbott, District Attorney, Lassen County, California
Thomas M. Kelly, District Attorney, Alpine County, California
Gerald E. Flanagan, District Attorney, Plumas County, California
Bruce B. Bales, District Attorney, Marin County, California

(This footnote is continued on next page)

Jurisdictional Grounds.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254(1), and Rule 22 of the Rules of this Court. The judgment of the Court of Appeals in each case was entered on October 29, 1975. This Petition was filed within 90 days of such date. There was no petition for rehearing in either case.

Jurisdiction of the United States District Court in each case was invoked under 28 U.S.C. sections 1331 (a) and 1332(a). In the *General Mills* case Jones also relied upon, for purposes of his counterclaim (in addition to the foregoing sections), 21 U.S.C. section 332 and the jurisdictional doctrine of pendent or ancillary administration. Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. section 1291.

Question Presented.

Whether enforcement provisions of the California statutes and regulations pertaining to accuracy of weights and measures are preempted by federal laws pursuant to Article 6, clause 2 of the Constitution of the United States.[2]

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Christopher C. Cottle, District Attorney, Santa Cruz County, California
D. Lowell Jensen, District Attorney, Alameda County, California
Duncan M. James, District Attorney, Mendocino County, California
Joseph W. Kiley, District Attorney, Calaveras County, California
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Edwin L. Miller, Jr., District Attorney, San Diego County, California
Ralph B. Jordan, District Attorney, Kern County, California

[2]Art. 6, Clause 2. Supreme Law of Land.
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Constitution, Statutes and Regulations Involved.

The relevant constitutional provisions, statutes and regulations are as follows:

California.

Business and Professions Code, section 12211, Stats. 1939, c. 43, p. 450, as amended Stats. 1949, c. 1384, p. 2407; Stats. 1957, c. 1658, p. 3038; Stats. 1963, c. 353;

4 California Administrative Code, Chapter 8, subchapter 2, Article 5 (Sometimes referred to in the text as "Article 5".)

Federal.

Constitution of the United States, Article 6, clause 2.

52 Stat. 1047, 21 U.S.C. section 343(a) and (e);

81 Stat. 584, 21 U.S.C. section 601(n)(1) and (5);

81 Stat. 600, 21 U.S.C. section 678;

9 Code of Federal Regulations, section 317.2 (h)(2), page 503;

21 Code of Federal Regulations, section 1.8b (q), page 17.

Statement of the Cases.

These cases arise under the Federal Wholesome Meat Act of 1967, the Federal Food, Drug, and Cosmetic Act, and the California Business and Professions Code, and involve provisions relating to the protection of the consumers, packagers and sellers of products. The subjects of the actions are short-weight packages of meat food products and wheat flour packed by the respective respondents. Upon inspection by Jones on a sampling of so-called "lots" of packages at the retail and wholesale levels, he ordered the lots "off sale" on the basis that the weights of the package contents did not conform to the weights stated on the package labels within the range of tolerances prescribed by California regulations.

The *Rath* case to date is a saga of parallel proceedings on identical issues in both the state and federal courts. The case of *General Mills, et al.*, was litigated only in the federal courts. The Director of Food & Agriculture of the State of California, acting through the California Attorney General, intervened on behalf of Jones in the *Rath* litigation.

In both cases the respondents contended that the California statutes and regulations were in conflict with, and preempted by, federal statutes dealing with packaged products misbranded as to labeled weight of package contents. The respondents sought declaratory relief and further sought to enjoin Jones from enforcing the California regulations through the process of ordering the merchandise off sale.

The Riverside Superior Court granted Jones' motion for summary judgment in the *Rath* case, and determined that enforcement of the California law and regulations was not preempted by the federal acts.

However, subsequently the United States District Court granted Rath's motion for summary judgment against Jones, 357 F.Supp. 529, Appendix, page 57, its decision on the preemption issue being diametrically opposed to that of the Riverside Superior Court.

In the *General Mills* case the United States District Court likewise found the state law on off sale procedures to be preempted by federal law, relying on its decision in the *Rath* case.

The United States Court of Appeals for the Ninth Circuit, in separate opinions filed on October 29, 1975, affirmed the judgments of the District Court on the preemption issue.

REASONS FOR ALLOWANCE OF THE WRIT.

I

THE PUBLIC IMPORTANCE OF THE ISSUE PRESENTED.

State jurisdiction over weights and measures in the market place is basic in the American law.

> "If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products." *Plumley v. Massachusetts,* 155 U.S. 461, 472, 39 L.Ed. 223, 15 S.Ct. 154 (1894).
>
> "[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144, 10 L.Ed.2d 248, 83 S.Ct. 1210, reh.den., 374 U.S. 858 (1963).

In practice, the methods employed under the California weights and measures regulations and similar regulations followed in other states preserve the *single national standard of accuracy* needed for the protection of consumers, retailers and packagers. However, under the decisions of the Ninth Circuit the sound enforcement of weights and measures laws in the United States in accordance with a uniform standard becomes a practical impossibility.

The consumer is not the only one who loses from an ineffective weights and measures enforcement pro-

gram. Such law enforcement is equally important to wholesalers and retailers. They also buy in packages, although in larger units. The baker who buys a 50-pound sack of flour, or the butcher who buys a 50-pound box of ground beef, are each entitled to receive 50 pounds.

To compound the problem, the failure to police shortages effectively will hurt business itself because it will stifle fair competition. The packer or producer that shorts the most forces others to lower their standards to his standard or below, and then another process of shortages can be triggered. Moreover, there can be financial losses for farmers too because what the packer does not put into the package he does not buy from the farmer.

Obviously, these problems are not confined to California alone. They exist throughout the nation.

II

THE DIRECT CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION IN THE GENERAL MILLS CASE AND THE SECOND CIRCUIT'S DECISION INVOLVING THE SAME MILLING COMPANIES, AND THE RAMIFICATIONS OF SUCH CONFLICT.

The decisions of the United States District Court in the case of *General Mills, Inc., et al. v. Betty Furness,* and the Memorandum Order of the Court of Appeals for the Second Circuit filed on January 10, 1975, are reproduced in the Appendix, beginning at p. 93.[3]

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[3]*General Mills, Inc., The Pillsbury Company, Seaboard Allied Milling Corporation v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York,* U.S. District Court,

The ordinance challenged by the milling companies in New York was Section 833-16.0 of the Administrative Code of the City of New York which provided in pertinent part:

> "It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . ."

The District Court ruled that the ordinance as applied in accordance with Handbook 67 of the National Bureau of Standards, United States Department of Commerce, did permit reasonable weight variations, that there was no irreconcilable conflict between local and federal law, and that, therefore, the New York ordinance was not preempted by federal law. Its determination was affirmed on appeal to the Second Circuit.

Handbook 67 employed by the Department of Consumer Affairs of the City of New York is substantially similar to the California weights and measures regulations, the so-called Article 5, Appendix, p. 70, invalidated by the Ninth Circuit. It is a model code of the National Bureau of Standards. The court may take judicial notice that all of the states either have adopted Handbook 67 as a part of their weights and measures laws or have laws and regulations authorizing [as does California] the use of lot sampling plans comparable to the lot sampling plan of Handbook 67.

The first Model Law, as such, was formally adopted by the Conference on Weights and Measures in 1911. "Through the years, almost without exception, each State has relied upon the Model Law at the time they

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So.Dist. N.Y., 73 Civ. 2497, orders filed February 25, 1974, and July 3, 1974; affirmed, U.S. Court of Appeals for Second Circuit, 508 F.2d 836, January 10, 1975.

[sic] first enacted comprehensive weights and measures legislation. This has led to a great degree of uniformity in the basic weights and measures requirements throughout the country." Foreword to the Model State Weights and Measures Law 1973 as adopted by the National Conference on Weights and Measures published by United States Department of Commerce, National Bureau of Standards, 1973.

Handbook 67 could be invalidated by the decisions in the cases at bar because of the following factors (all of which are present in California's Article 5):

(1) It allows examinations of lots instead of only single packages; (2) it sets numerical limits on the overpacking and underpacking of individual packages in a lot; (3) it requires an *average* net weight or measure *per lot;* (4) it allows larger amounts of overpacking for hygroscopic products (products which may gain or lose moisture) so they will average net weight by lot at time of sale. [By comparison, under the federal "standard" as interpreted by the Ninth Circuit each individual package must be judged separately and a "reasonable" amount of shortage allowed.] Accordingly, if, by a parity of reasoning, the laws and regulations of states employing Handbook 67 become unenforceable for reasons applied by the Ninth Circuit to California's Article 5, there will be shortages in the marketplace in a large part of America.

Foreign packed packages would likewise be subject only to the "reasonable variations" test of the federal regulations as interpreted by the Ninth Circuit. Policing efforts are difficult enough when applied to domestic products. The Ninth Circuit's "reasonable variations" test would become virtually impossible of application when applied to packages packed in foreign lands.

The efforts of the millers to frustrate state inspection were rejected in New York but not in California. The Second and Ninth Federal Circuits are in direct conflict.

III

THE CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISIONS AND DECISIONS OF THIS COURT ON CONSTITUTIONAL PRINCIPLES.

1. Concurrent Jurisdiction of the Federal and State Governments.

21 U.S.C. section 678, Appendix, page 91, provides in relevant part as follows [this is part of the Federal Wholesome Meat Act]:

> ". . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but *any State* or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such *articles which are adulterated or misbranded* and are outside of such an establishment, . . ." [Emphasis added].

A meat food product is "misbranded" if the label statement as to package contents is "false or misleading." 21 U.S.C. section 601(n)(1) [see also 21 U.S.C. section 343(a)]. Short-weighting is misbranding. 21 U.S.C. section 601(n)(5) [see also 21 U.S.C. section 343(e)]. Misbranding can be determined only after examining and comparing the representations on the label with the package contents.

If, as indicated by the Ninth Circuit,[4] there is no substantial difference between "labeling," as used in the first part of section 678, *supra*, and "misbranding," then the provisions of section 678 which speak of "articles which are adulterated and misbranded" are indeed redundant. Congress must not, however, be presumed to have performed an idle act in delineating the respective jurisdictional areas of the state and federal governments. Under the above quoted terms of section 678 the states and the Secretary of Agriculture have *concurrent jurisdiction* to prevent the distribution of *misbranded* meat food packages, which would include packages misbranded as to weight. The Secretary has *controlling jurisdiction* to regulate the *labeling* of packages. Both federal and state statutes recognize this controlling jurisdiction of the federal government with regard to labeling.[5]

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[4]Footnote 25, Appendix, p. 28, and footnote 3, Appendix, p. 45.

[5]Pub.L. 89-755, §12 (1966), 80 Stat. 1302, 15 U.S.C. section 1461 [Federal Fair Packaging and Labeling Act]. "*Effect on State Law.* It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto."

Under the Savings Provisions of 15 U.S.C. section 1460, compliance with the Food, Drug, and Cosmetic Act is to be considered compliance with the Fair Packaging and Labeling Act.

California Business and Professions Code section 12613 [California Fair Packaging and Labeling Act]:

(This footnote is continued on next page)

Jones, as an officer enforcing state laws, has not told Rath or the milling companies what kinds of labels to put on their packages of bacon or flour, nor what to say on the labels, nor what the sizes, styles, or patterns of the labels should be, as distinct from maintaining accuracy of contents. All that he required in effect was that the label be not false, misleading or deceptive to the consumer in its statement of the net weight of the product to which the label was attached. *Jones merely enforces the legitimate interest of the state in ensuring that the consumer gets the product quantity represented to him by the package label.* The following language of California Business and Professions Code section 12211, which has been invalidated by the lower court, speaks not of labeling. It is not a part of the California Fair Packaging and Labeling Act. Its emphasis is upon *removal from the marketplace* of any package containing "a less amount than that represented":

> "Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, *a less amount than that represented,* the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container

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"Provisions less stringent or requiring information different from federal act inoperative

"If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the act of Congress entitled 'Fair Packaging and Labeling Act' (P.L. 89-755; 80 Stat. 1296; 15 U.S.C. 1451-1461)[1] or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement, is a part of this chapter."

> before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain *a less amount than that represented.*" [Emphasis added.]

2. Concurrent "Powers" of the Federal and State Governments.

(a) The Prohibition Cases.

A substantial body of case law that sheds light on the scope of federal and state authority where a traditional police power of the state becomes concurrent with a power of the federal government, was developed during the so-called Prohibition Era of the 18th Amendment and the Volstead Act, 41 Stat. at L.305, Ch. 83, Acts 66th Cong. 1st Sess. As in the case of foodstuffs, the regulation of the traffic in liquor has long been a traditional police power of the states. *Vigliotti v. Pennsylvania,* 258 U.S. 403, 66 L.Ed. 686, 42 S.Ct. 330 (1921); *United States v. Lanza,* 260 U.S. 377, 67 L.Ed. 314, 43 S.Ct. 141 (1922). The text of the 18th Amendment was as follows:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several states shall have *concurrent power* to enforce this article by appropriate legislation." [Emphasis added.]

Section 2 of the 18th Amendment spoke of *concurrent "power"* of the Congress and the several states, whereas the language of 21 U.S.C. section 678 is *concurrent "jurisdiction."* It is reasonable to treat the two terms as synonymous.

The word "jurisdiction" has been defined to be, among other things, the "power to declare and enforce the law," 50 C.J.S. 1091. The term "concurrent powers" has been defined as political powers exercised independently in the same field of legislation by both federal and state governments. 8 *Words and Phrases,* 608 *et seq.*[6] A "concurrent power excludes the idea of a dependent power. . . ." Mr. Justice McLean in the *Passenger Cases,* 7 How. 283, 399, 12 L.Ed. 702, 750 (1849).

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[6]A prime example of an area of operations in which the federal and state governments have concurrent jurisdiction (concurrent powers) is that of taxation. The taxing power of a state is one of its attributes of sovereignty. It exists independently of the Constitution of the United States, and may be exercised to an unlimited extent, except so far as it has been surrendered to the federal government. *Union Pacific R.R. Co. v. Peniston,* 18 Wall. 5, 21 L.Ed. 787 (1873). In *M'Culloch v. Maryland,* 4 Wheat. 316, 425, 4 L.Ed. 579, 606 (1819), Chief Justice Marshall stated: "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be *concurrently exercised by the two governments;* are truths which have never been denied." [Emphasis added.]

The general principle as to the right of the states to exercise the power of effective legislation concerning subjects over which Congress also has power was stated by this court in *Gilman v. Philadelphia,* 3 Wall. 713, 730, 18 L.Ed., 96, 101 (1865) [summarizing language of Mr. Justice Story in *Houston v. Moore*, 5 Wheat. 1, 49, 5 L.Ed. 19, 30 (1820)]: "The states may exercise concurrent or independent power in all cases but three: (1) Where the power is lodged exclusively in the Federal Constitution. (2) Where it is given to the United States and prohibited to the states. (3) Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."

In *Wedding v. Meyler,* 192 U.S. 573, 24 S.Ct. 322, 48 L.Ed. 570, 66 L.R.A. 833 (1903), and in *Nielsen v. Oregon,* 212 U.S. 315, 29 S.Ct. 383, 53 L.Ed. 528 (1908), "Concurrent jurisdiction" was given respectively to Kentucky and Indiana over the Ohio River by the Virginia Compact, and respectively to Washington and Oregon over the Columbia River by Act of Congress. It was decided that such concurrent jurisdiction conferred equality of powers, and that neither state could override the legislation of the other.

The nature of the respective powers of the state and federal governments to regulate at the local level was outlined by Mr. Justice Taft in *United States v. Lanza, supra,* 260 U.S. 377. The court stated that although the second section of the 18th Amendment meant that Congress had the power to take legislative measures to make the policy of the amendment effective, at the same time the like power of the states within their territorial limits "*shall not cease to exist.*" 260 U.S. at page 381.

"Each state, as also Congress," stated the court, "may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States, and such as are adopted by a state become laws of that state. *They may vary in many particulars, including the penalties prescribed,* but this is an inseparable incident of independent legislative action in distinct jurisdictions." [Emphasis added.] 260 U.S. at page 381.

In stressing that the power of the states to enforce prohibition did not originate in the 18th Amendment the court stated:

> "To regard the Amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, *each state possessed that power in full measure prior to the Amendment,* and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that, in vesting the national government with the power of countrywide prohibition, state power would be excluded . . ." [Emphasis added.] 260 U.S. at page 381.[7]

To paraphrase the foregoing language in *Lanza,* the probable purpose of declaring, in 21 U.S.C. section 678, that the states should be vested with concurrent jurisdiction at the distribution level to prevent the misbranding of packages of meat, was to "*negative* any possible inference" that state power [which existed long before the Federal Wholesome Meat Act] would be excluded.

(b) Concurrent Powers to Protect Against Adulteration and Misbranding.

(1) *The Rath Case.*

There is an obvious parallel between the concurrent jurisdiction of the states to deal with the problems

[7]Regardless of whether the criminal law principle with respect to double jeopardy established in the *Lanza* case

of adulteration and misbranding of meat food products, as provided in 21 U.S.C. section 678, and the states' concurrent powers relating to liquor prohibition. If the supremacy of the federal government in dealing with adulteration and misbranding had been intended, thereby subordinating the longstanding police power of the states, it would have been directly declared in section 678, just as it was declared as to "marking, labeling, packaging, and ingredient requirements." The Congress had the whole vocabulary of the English language to draw upon in shaping the terminology of section 678.

The court below in its *Rath* decision has converted a function traditionally and historically exercised by the states into a form of impotence, not of power. A function has become in effect a nonfunction. The term "concurrent jurisdiction" as it appears in the statute has been denuded of any practical meaning. The *Rath* decision accordingly is contrary to the decisions of this court.

(2) *The General Mills Case.*

Section 678 has no counterpart in the Federal Food, Drug and Cosmetic Act. Nevertheless, the Court of Appeals in its *General Mills* opinion found in effect that state law, namely, Business and Professions Code section 12211, Appendix, p. 69 was preempted by federal law. This section authorizes the county sealer [such as Jones] to weigh or measure packages to determine whether they "contain the quantity or amount represented . . ." The state Director of Food and

is followed by the courts today [see 1 Witkin, Crimes 195], the general proposition relating to state sovereignty vis-a-vis the sovereignty of the federal government reaffirmed by the court remains as a basic rule of modern jurisprudence.

Agriculture is authorized by such statute to adopt regulations governing the weighing and measuring procedures, and the county sealer may order off sale a lot of any commodity "found to contain . . . a less amount than that represented . . ." The court also invalidated Article 5, Appendix, page 70, of the California Administrative Code, the regulation adopted under the authority of section 12211. It ruled that there was an "impermissible conflict" between the foregoing California statutory and regulatory provisions and the Federal Food, Drug and Cosmetic Act, particularly 21 U.S.C. section 343(e), Appendix, pages 90-91, and the Federal Fair Packaging and Labeling Act, *supra,* pages 13-14, footnote 5.[8]

The provisions of 21 U.S.C. section 343(e) must be read in conjunction with its interpretive regulation, 21 C.F.R. 1.8b(q), Appendix, page 92. Together they provide that a food package is deemed to be "misbranded" unless it bears a label containing an accurate statement as to weight or measure, provided that "reasonable variations" caused by gain or loss of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. If preemption exists, then, according to the reasoning in the *General Mills* opinion, corresponding identical sections of the

[8]As discussed, *supra* (page 13), there is no labeling problem in these cases within the scope of the federal and state labeling statutes. It was an error for the court below to import the state and federal labeling acts into the case in arriving at its determination of an impermissible conflict between state and federal law *in the enforcement of accuracy of contents.*

Federal Wholesome Meat Act and its interpretive regulations are also preemptive of state law. 21 U.S.C. section 601(n)(5); 9 C.F.R. section 317.2(h)(2), Appendix, pages 91 and 93.

The problem in the *General Mills* case is not in a conflict between state and federal laws and regulations. Rather the problem is in the lower court's *interpretation* of the federal laws and regulations. The court's concept of the federal standard is that it relates to the accuracy of the contents of *packages,* and that it is applied on a product-by-product basis and on a packaging plant-by-packaging plant basis. This interpretation perforce means that the federal standard must vary depending upon the product involved. For example, the criteria applied to packages of spaghetti in determining "reasonable variations" will differ from those applied to canned dog food. The factors would vary also according to whether the product is hygroscopic or non-hygroscopic. Moreover, the factors to be considered would vary if the packaging plant were located, say, in El Paso, Texas, rather than Tokyo, Japan, or if the product were being shipped to Riverside, California rather than Minneapolis, Minnesota.

Contrasted with the foregoing standard as conceived by the Court of Appeals is the standard of Handbook 67 of the National Bureau of Standards, *supra,* page 10. As earlier stated, the systems employed by Handbook 67 and California's Article 5 follow the same concepts, both using a statistical sampling to determine the accuracy of the particular *lot* being checked. The

same procedure applies to all packaged commodities. The handbook is intended as a procedural guide for legal control of prepacked goods by federal, state, and local regulatory officials.

Under both Article 5 of the California regulations and Handbook 67 the weight or measure of the *lot* examined by the inspectors on a sampling basis must equal the *average* net weight or measure of the packages in the lot at the time of inspection. The inspectors determine whether the average of underweight and overweight packages is within a range of reasonable tolerances of accurate weight. Numerical limits are applied from a table of tolerances regardless of where packed or the type of commodity in the packages. A packer that meets the standards of accuracy of California meets the standard of every other state and every federal agency using the principles adopted by the Secretary of Commerce in Handbook 67.

Under the Ninth Circuit's interpretation there would be variations differing from product to product over thousands of products together with differences in hygroscopic products arising from a myriad of different and widespread packing locations. Foreign competitors in hygroscopic products would have an advantage over American competitors in that foreign products could be more short weight than domestic products because of longer distances for distribution. Moreover, manufacturers with inefficient filling capabilities would have a competitive advantage over companies having more accurate systems.

To accept the interpretation of the Ninth Circuit would be to dilute a standard of uniformity, *i.e.*, accuracy, among the states, into a myriad of standards throughout the land.

The methods employed under Article 5 and Handbook 67 preserve the *single national standard of accuracy* needed for the protection of consumers, retailers, and packagers.

This court stated in *Florida Lime and Avocado Growers, Inc. v. Paul, supra,* 373 U.S. 132, that federal regulation of a field of commerce should not be preemptive of state regulatory power in the absence of persuasive reasons—either [1] that the nature of the regulated subject matter permits no other conclusion, or [2] that the Congress has unmistakably so ordained, 373 U.S. 132, 142. We submit that *Congress has not "so ordained" by the simple terminology of 21 U.S.C. sections 343(e) and 601(n)(5).*

It is a basic proposition that conflicts between state and federal regulations are not to be sought where none exists. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R.2d 1294 (1960). Whenever the federal power is exerted within what would otherwise be the domain of state power, the justification for its exercise must clearly appear. *Florida v. United States,* 282 U.S. 194, 75 L.Ed. 291, 51 S.Ct. 119 (1930). It will not be held that a federal statute was intended to supersede the exercise of the power of the state, unless there

is clear manifestation of intention, since the exercise of federal supremacy is not lightly to be presumed. *Schwartz v. Texas,* 344 U.S. 199, 97 L.Ed. 231, 73 S.Ct. 232 (1952).

Summary and Conclusion.

The decisions below eliminate a single standard based on lot sampling and statistical concepts and substitute an unenforceable assortment of undefined shortages determined on a package-by-package basis. The New York federal courts in *General Mills v. Furness* denied such an unenforceable standard.

Properly interpreted, California's law and the laws of the states that apply the principles of Handbook 67 are in accord with the federal standard as it was meant to be, not as it was interpreted by the Ninth Circuit. There is no conflict.

No preemption was intended by any of the federal acts as to the *quantity of contents.* The only preemption intended was as to the *format of labeling* and the *placement of labeling* on packages. As to such requirements, California is in accord with federal laws.

In short, the federal and state acts have long been in harmony. California's law is a part of a uniform system. The expressed intent of Congress to *enhance* consumer protection belies any congressional intent to destroy a national system of label accuracy and replace it with an unenforceable system.

Regulating weights and measures is "one of the oldest exercises of governmental regulatory power." *Swift and Co. v. Wickham,* 230 F.Supp. 398, 402 (S.D.N.Y. 1964); affirmed 364 F.2d 241 (2d Cir. 1966); cert. den. 385 U.S. 1036 (1967). In the enactment of the federal acts involved in these proceedings Congress has not taken such regulatory power away from the states.

We respectfully submit that the Petition should be granted.

Dated: January 23, 1976.

RAY T. SULLIVAN, JR.,
County Counsel,
Riverside County, California,

LOYAL E. KEIR,
Deputy County Counsel,

Counsel for Petitioner, Joseph W. Jones, Director of Department of Weights and Measures, County of Riverside, California.

(CORRECTED)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE RATH PACKING COMPANY, a corporation, *Plaintiff, Counter-Defendant and Appellant,* vs. M. H. BECKER as Director of the County of Los Angeles Department of Weights and Measures, *Defendant, Appellee and Cross-Appellant.*	Nos. 73-2481 73-2482 73-3092
C. B. CHRISTENSEN as Director of Agriculture of the State of California, *Intervenor, Appellee and Cross-Appellant.*	
THE RATH PACKING COMPANY, a corporation, *Plaintiff and Appellant,* vs. JOSEPH W. JONES as Director of the County of Riverside Department of Weights and Measures, *Defendant, Appellee and Cross-Appellant.*	Nos. 73-2496 73-3180 OPINION

[October 29, 1975]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and TRASK, Circuit Judges,
and RICH, Judge.*

RICH, Judge:

These suits were brought by Rath Packing Company (hereinafter "Rath") to enjoin the enforcement of certain California statutes and regulations pertaining to the labeling by weight of

*The Honorable Giles S. Rich, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

packaged foods at retail, and for a declaration that the federal Wholesome Meat Act of 1967, 21 USC, §601 et seq., and a regulation promulgated thereunder, 9 CFR 317.2(h)(2), preempt these California statutes and regulations. They were consolidated for decision in the district court and on appeal.

Rath is a nation-wide processor and seller of meat products, including bacon, and maintains a meat-packing establishment at Vernon, California, which is subject to federal inspection under the Wholesome Meat Act and 9 CFR 302.1 as an establishment in which "any products of • • • carcasses of livestock are • • • prepared for transportation or sale as articles of commerce, which are intended for use as human food." Becker and Jones are the Directors of the Departments of Weights and Measures of Los Angeles and Riverside Counties, California, respectively. They are responsible for the actual enforcement of the State weights and measures laws in their counties. Intervenor Christensen is the Director of Agriculture of the State of California.

Jurisdiction in the district court was based on 28 USC, §1331(a), as it was alleged that a case or controversy arising under the laws of the United States involving more than $10,000 was presented.[1] We have jurisdiction of this appeal under 28 USC, §1291.

The district court, in a memorandum and order reported at 357 F. Supp. 529 (C.D. Cal. 1973), granted in part the relief requested, and all parties appealed the determinations adverse to them.

This case is a companion to *General Mills, Inc., et al. v. Jones*, Nos. 73-3583 and 74-1051, decided concurrently herewith. Much of the discussion in this opinion is applicable to the *General Mills* case as well.

Background

This case concerns the packaging and weighing of bacon. In order to understand the issues, a brief description of the properties of bacon and how it is packed and weighed is necessary.

The weighing and packaging of bacon at the Rath plant takes place under internal Rath procedures which have been submitted to an official of the United States Department of Agriculture (USDA). After the pickled and smoked pork bellies come from

[1]It is not disputed that the jurisdictional amount is present.

the bacon press, where they are squared into uniform rectangular shapes, they are sliced by a machine, which distributes the slices in "drafts" of approximately one pound weight. An operator places each draft on an insert, or "tux", board, which is a hardboard coated either with wax or with polyethylene.[2] The drafts are then passed to a scaling station, where they are weighed and the operator either adds or removes bacon to bring the weight within a predetermined target limit. After scaling the bacon is passed to a tux overwrap machine, which inserts the bacon into a carton and seals it. This carton is not hermetically sealed and the bacon in it does lose some moisture to the atmosphere over time. Although Rath now does use some hermetically sealed bacon containers, this packing method is agreed to be in accordance with good distribution practices. Once the bacon is weighed at the scaling station, it is not weighed again before it leaves the Rath plant, an average of 4 days, never more than 8 or 9 days, later. In determining the pass zone Rath follows the USDA procedure of subtracting from the actual weight of the draft and the tux board on which it lies the weight of a *dry* tux board. This method uses a "dry tare."[3] There is no evidence that Rath has violated federal weight standards in any way.

The federal program for regulation of net weight labeling of meat and meat food products exists in part under the Wholesome Meat Act of 1967, supra. The Act added the concept of "misbranding" to the prior federal meat inspection laws. 21 USC §601(n) provides in relevant part:

> (n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:
>
> • • • •
>
> (5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate

[2]The polyethylene-coated boards have absorbed 4/16 oz. less of bacon moisture and grease than the wax-coated board 4 days after pack. The saturation point of waxed board is reached 6 to 9 days after pack; about 5/16 oz. is absorbed.

[3]"Tare. • • • 1a: the weight of a container or vehicle that is deducted from the gross weight to obtain the net weight." *Webster's Third New International Dictionary* 2341 (1971).

statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary [of Agriculture];

• • • •

In 9 CFR 317.2(h)(2) the Secretary purported to implement §601(n)(5):

(2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

In the supermarket the California inspectors employed a different weighing method, using a "wet tare."[4] The California procedure is set forth in detail in 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5. Briefly, the California inspectors follow a twelve-step procedure set forth in Section 2933.3 of the regulations:

(1) determine the number of packages in the lot to be sampled;

(2) from a table in the regulation, determine the total package sample size (e.g., 15 packages out of a lot of 300);

(3) from the same table, determine the tare sample size (e. g., 2 packages out of a lot of 300);

(4) record the gross weight of each tare sample package;

(5) remove the usable contents from each tare sample, weigh the used, empty container, and compute the average tare weight;[5]

[4]The difference in tares employed is not an issue in this case.

[5]The container and tux board are weighed with all matter adhering to the tare that does not pull off when the bacon is removed included, as well as with any grease or moisture that the tux board may have absorbed from the bacon. This is "wet tare."

(6) weigh the remaining packages in the package sample and record their weights, determining the amount of error from labeled weight for each package;

(7) [not applicable to bacon];

(8) calculate the preliminary total error for the sample, and determine the arithmetical average error;

(9) calculate the range of error for each sub-group of the package sample;

(10) determine whether any unreasonable errors exist, and eliminate from further computations all samples whose errors exceed the preliminary average error in underweight situations by more than the amounts set forth in tables in the regulations; if the number of unreasonable errors exceeds a certain set figure for each sample size, further action, including the issuance of off-sale orders, may be undertaken.

(11) recalculate the total and average error of the sample excluding the unreasonable errors;

(12) "(a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

"(b) If the total error obtained from the sample is less than the above-determined value, and the error is minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot." [Sec. 2933.3.12.]

If an inspector cannot pass the lot based on this sampling technique or after retesting, he then may order the lot off-sale under the provisions of California Business and Professions Code §12211:

> Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.
>
> • • • •
>
> Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before the same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

Evidence was adduced at the trial from various California officials, including Becker, that the county departments do not recognize variations in net weight that result from water loss during good distribution practice. Mr. Cervinka, a statistician employed by the California Department of Agriculture, testified on direct examination as an expert for Christensen that Art. 5 of the regulation, described above, is a statistically valid procedure. On cross-examination he indicated that Art. 5 does not make any distinction between products that lose water and those that do not, nor does it make provision for any weight reductions during the course of handling. On this and other evidence the district court concluded that Art. 5 uses "absolute" weight as determined by statistical methods as its measure of compliance and makes no reference in describing the steps of the weighing and calculating process to reasonable variations from label weight caused by "loss • • • of moisture during the course of good distribution practice." The district court's fact findings have substantial evidentiary support and are not clearly erroneous. F.R.Civ.P. 52(a). Becker, Christensen, and Jones do not urge error in the district court's construction of Art. 5.

Procedural History

During the period September 1971 to March 1972 inspectors under the supervision of Becker and Jones visited supermarkets in Los Angeles and Riverside Counties and weighed packages of Rath bacon to determine compliance with the State statute and

regulations concerning net weight labeling. Becker's representatives ordered approximately 84 lots of bacon off sale for short weight; Jones ordered nearly 400 packages of Rath bacon off sale in the period September 29 to December 30, 1971, for the same reason.

On February 17, 1972, the Riverside County Counsel brought an action in the name of the People against Rath in the Superior Court for Riverside County for an injunction under Cal. Civ. Code §3369[6] and for civil penalties under Cal. Bus. and Prof. Code §17536,[7] alleging that Rath had committed acts of unfair competition in violation of Cal. Bus. and Prof. Code §17500[8] by distributing for sale in Riverside County supermarkets the packages of bacon that Jones' representatives had ordered off sale. On March 1, 1972, the Los Angeles County Counsel filed a similar action against Rath in the Superior Court for Los Angeles County.

Rath removed both actions to federal district court within a week thereafter; but on March 20, 1972, the district court remanded the actions to the State courts, finding, at least with respect to the Riverside action, that there was no diversity of citizenship and that "[n]o substantial federal question is presented on the face of the pleadings."

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[6]Civil Code §3369 provides in material part:

> 2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.
>
> 3. As used in this section, unfair competition shall mean and include • • • any act denounced by Business and Professions Code Section 17500 to 17536, inclusive.

[7]Section 17536:

> (a) Any person who violates [§17500] shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

[8]Section 17500:

> It is unlawful for any • • • corporation • • • to make or disseminate or cause to be made or disseminated before the public in this State, any representation • • • in any • • • manner or means whatever, concerning • • • personal property • • • or concerning any circumstances or matter of fact connected with the • • • disposition thereof, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading • • •.

Meanwhile, on March 17, 1972, Rath filed two actions in federal district court, one against the People[9] and Becker, the other against Jones. Rath requested declarations that the California statutes and regulations impose labeling standards on meat food products prepared by Rath that are in addition to or different than the standards of the Wholesome Meat Act of 1967, specifically 21 USC, §601(n)(5) and 9 CFR 317.2(h)(2) and that California could not impose weight labeling requirements on Rath meat food products after they left the Rath plant. Rath also requested injunctions against the enforcement by Becker and Jones of labeling requirements in addition to or different than those in the Act and against the ordering off-sale or otherwise preventing the sale of Rath products for failure of the products to bear an accurate label in terms of net weight after they have left Rath's plant. Becker, Jones, and Christensen counterclaimed for the same relief sought by the State in the state court actions.

After the remands, on March 30, 1972, Rath answered the state court complaints and filed cross-complaints seeking the same relief, in virtually the same language, as Rath sought in federal court. In July 1972 Christensen intervened in both the state and federal court litigations.

Becker filed in the district court motions requesting the court either to abstain from deciding the federal court action or to stay the federal action pending final determinations in the state court actions. The district court denied these motions in May 1972. On November 14, 1972, the superior court in the Riverside action dismissed Rath's cross-complaint; Rath appealed. On the very next day, Christensen and Becker moved the district court to dismiss Rath's action or to stay it pending decision on Rath's state appeal. The district court denied the motions, and this court, on Christensen and Becker's petition for a writ of prohibition, declined to disturb the district court's assumption of jurisdiction.

On April 3, 1973, the district court, after a trial on the merits of Rath's action against Becker and on cross-motion for summary judgment in the action against Jones, entered judgment declaring

[9]The People were dismissed as a party by the district court on the ground that the Eleventh Amendment bars suits against the State of California by a citizen of another State. Rath is an Iowa corporation and is a citizen of Iowa for this purpose. No appeal was taken from this dismissal.

Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5 to be preempted by federal law and enjoining their enforcement. In the course of its Memorandum the court held that 9 CFR 317.2(h)(2) was invalid, and that thus the sole federal labeling standard was "accurate" weight. The court also held that accurate weight labeling standards could be applied to packages of meat and meat food products at the retail level. Cross-appeals were taken to this court.

The Riverside action continued, and in January 1974, while Rath's first appeal was still pending in the California District Court of Appeal, the superior court entered summary judgment on the complaints of Jones and Christensen against Rath; Rath appealed again. In an unreported decision in April 1974 on Rath's first appeal, the California appellate court reversed the dismissal of Rath's cross-complaint against Jones, holding that the federal court's judgment was *res judicata* on the issue of the validity of §12211 and Art. 5 (to the extent that it implemented §12211). On Rath's second appeal, in December 1974, the appellate court reversed the grant of summary judgment on the complaints and remanded the case to the Riverside superior court for trial, holding that there existed issues of fact that required trial. *People v. Rath Packing Company*, 44 Cal. App. 3d 56, 118 Cal. Rptr. 438 (1974). The appellate court also explained further the basis of its decision on Rath's first appeal, holding that the effect of the federal court judgment was to preclude relitigation of the narrow issue of the preemption of §12211, and its implementation in Art. 5, by the Wholesome Meat Act. The appellate court held, 118 Cal. Rptr. at 446 n. 6, that Art. 5 is not unconstitutional.

Although the record does not contain any notice of the proceedings in the Los Angeles superior court action, we are informed by Rath's reply brief that in February 1974 the Los Angeles court gave *res judicata* effect to the final judgment on the preemption issue and decided in Rath's favor the issues of constitutionality and whether Becker's ordering of Rath's bacon off sale complied with state law. An appeal from this judgment is pending.

I.

Becker, Jones, and Christensen contend that the district court lacked jurisdiction of the subject matter before it, and, in the alternative, that the principles of abstention and comity required

the court to stay its hand until the state court actions had proceeded to judgment. We reject both contentions.

A.

The question of subject matter jurisdiction may be raised by the parties at any time or by the court sua sponte. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1938); F.R.Civ.P. 12(h)(3). Becker et al. first contend that the declaratory judgment actions brought by Rath are nothing more than attempts to get collateral review of the remands to state court of the actions brought against Rath by the People which Rath had removed to the district court. 28 USC, §1447, provides:

> §1447. *Procedure after removal generally.*
>
> • • • •
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise • • •.

Their second contention is that Rath's claim for declaratory and injunctive relief in the district court is in reality a defense to the state court actions, and, as such, cannot form a basis for federal question jurisdiction under 28 USC, §1331.

After the institution of Rath's federal action Becker et al. presented these contentions to this court by way of a petition for a writ of prohibition, *Becker et al. v. Real*, No. 72-3037, which the court, ELY and HUFSTEDLER, Circuit Judges, denied.[10] We find no reason to depart from that decision.

Federal question jurisdiction is determined by the federal district court solely from the face of plaintiff's complaint. *Gully v. First National Bank*, 299 U.S. 109 (1936). Removability cannot be created by defendant pleading a counter-claim presenting a federal question under 28 USC, §1331. See 1 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) §102; *United Artists Corp. v. Ancore Amusement Corp.*, 91 F. Supp. 132 (S.D.

[10]"It appearing from the face of the pleading that the District Court has jurisdiction, the petition is denied. This Court does not, however, now express any further opinion on the merits of the controversy."

We are not foreclosed by this order from reexamining the jurisdictional issue at this time; we merely find the decision to be sound.

N.Y. 1950). Thus, Rath's answer and cross-complaint in the state court, raising its claim for declaratory and injunctive relief under federal law, were not[11] before the district court when it remanded the removed state court actions and do not raise any issues necessarily adjudicated by the court in deciding to remand. The decision of the district court that the case does not invoke the federal jurisdiction and must be remanded precludes further litgiation of the issue of the forum in which the *removed case* is to be litigated. *Missouri Pacific Ry. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896). The decision of the district court to remand has no bearing on the merits of the underlying claims. Since the district court did not make any decision with respect to the propriety of a federal forum for *Rath's* claims, we cannot say that the maintenance of Rath's claim in federal court works a circumvention of 28 USC, §1447(d). Cf. *Chandler v. O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971). Rath is not contending that the remand orders were erroneous, but only that it has a right to a federal forum for its alleged federal claims.

The argument that Rath's claims are not within the federal question jurisdiction, it not being denied that there is no diversity of citizenship, takes its roots in the statement of the Supreme Court in *Public Service Commission v. Wycoff*, 344 U.S. 237, 248 (1952):

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, *it is the character of the threatened action, and not of the defense*, which will determine whether there is a federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, *if that right is in reality in the nature of a defense to a threatened cause of action.* Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to

[11]And could not have been, since the remand order was entered March 20, 1972, and Rath's claims were first presented in the state court actions on March 30, 1972.

> begin his federal-law defense before the state court begins the case under state law • • • (emphasis added [by the Court]).

The doubt that the Court expresses is still with us, e.g., C. Wright, *Law of Federal Courts* §18, at 62 (2d Ed. 1970).

In order to appreciate the *Wycoff* case we must first look to the jurisdictional background of the Declaratory Judgment Act, 28 USC, §2201.[12] The Act is procedural only, creating a new federal remedy without expanding the jurisdiction of the federal courts. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937). "'Jurisdiction' means the kinds of issues which give right of entrance to federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950). The *Wycoff* "test" quoted supra has its origins in *Tennessee v. Union & Planters' Bank,* 152 U.S. 454, 464 (1894), where the Court said, "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Furthermore, the complaint of the declaratory plaintiff must present a federal question "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914).

In *Wycoff* the complainant brought an action for declaratory judgment against the Utah Public Service Commission, requesting a finding that the business conducted by complainant in carrying goods between points in Utah was interstate commerce (and thus not subject to regulation by the Commission). The principal concern of the Court was the nature of the controversy presented, 344 U.S. at 244;

> A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and the counsel little more articulate. We may surmise that the purpose to be served by a declaratory judgment

[12] §2201 provides:

> In a case of actual controversy *within its jurisdiction,* except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. • • •. (Emphasis added.)

> is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is "to *guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission." (Emphasis supplied [by the Court].)

From this the Court concluded that "this dispute has not matured to the point where we can see what, if any, concrete controversy will develop." 344 U.S. at 245. In the portion of *Wycoff* quoted three paragraphs above, the Court was applying its concern that the controversy was not ripe for adjudication by pointing out a declaratory plaintiff may not *create* a controversy by seeking to have a federal court adjudicate federal defenses he might assert in a proceeding before a state court or administrative tribunal which is not ripe, but which is merely threatened or impending.[13]

Another aspect of the matter was aired in *Chandler v. O'Bryan,* supra. O'Bryan brought a libel action in Oklahoma state court against Chandler, a United States District Judge, on statements made by Chandler to a newspaper accusing O'Bryan of bribing judges of the Oklahoma Supreme Court. Chandler removed the action to federal district court; but the district court held that the acts alleged in the complaint were not done in performance of Chandler's official duties as a federal judge, nor were they done under color of judicial office, and remanded the case to the state court for lack of a federal question, there being no diversity of citizenship. It is settled that Chandler's judicial immunity defense arises under federal law. *Howard v. Lyons,* 360 U.S. 593 (1959). A verdict for O'Bryan was returned in the state court. Chandler then filed a declaratory judgment action in federal court seeking to have the state libel judgment enjoined and expunged, alleging his federal judicial immunity claim. The district court granted relief to Chandler, 311 F. Supp. 1121 (W.D. Okla. 1969), but the

[13] The Court confirmed this view of *Wycoff* in *Public Utilities Commission of California v. United States,* 355 U.S. 534, 538-39 (1958):

> The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates unless the Commission first gives approval. The controversy is present and concrete—whether the United States has the right to obtain transportation service at such rates as it may negotiate or whether it can do so only with state approval.

10th Circuit (by a panel of three judges of the 8th Circuit) reversed.

The court found *Wycoff* directly applicable, and held that Chandler was seeking a separate federal adjudication of a matter which was "in reality in the nature of a defense" to the state court libel action, which was based solely on state libel law and raised no federal question itself. The action was dismissed for lack of federal jurisdiction.

The instant case is different. While it is true that judgment in Rath's favor affects the results of the Los Angeles and Riverside actions, we cannot say that Rath's action is premature or that Rath's claim is merely a defense to the state court actions. The ordering off-sale of Rath's products in September 1971 and afterward and the upward adjustment of the pass range at the sealing station at Rath's plant, increasing the overpack of bacon necessitated by California weighing procedures, it was stipulated below, caused Rath a loss of more than $10,000. The off-sale orders themselves are sufficient State action to create an actual controversy between Rath and the state weights and measures officials. See *Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 508 (1972). The present controversy was not created by the institution of the state court actions againt Rath, but arose independently thereof by virtue of the off-sale orders.

Unlike *Chandler,* Rath's claims have vitality in the absence of the litigation in state court; Rath had the right to a federal forum before the institution of the state court actions. Chandler's federal claim was purely in the nature of a defense to the libel action. Brought without reference to the underlying state court proceeding, Chandler's claim would be a useless gesture: no one would care whether Chandler acted under the protection accorded by the courts to his office if O'Bryan had refrained from suing him. That Rath's claim is or can be the basis for a defense to the state court actions states a mere truism;[14] the test is whether Rath

[14]Becker, Jones, and Christensen do not assert that Rath's cross-complaints in the state court actions were compulsory under Cal. Code of Civ. Proc. §428.10; they assert that they were *improper* pleadings under the statute. We have no opinion on this matter of state procedure, but it does seem to us to show that the interposition of affirmative claims by Rath in the state courts is not a relevant factor in determining whether the federal courts have jurisdiction of Rath's affirmative claims.

has created a federal controversy where none existed or is seeking an adjudication of a claim which is essentially meaningful only when pleaded as a defense to the particular pending state court actions. We find neither factor present and consider that Rath has stated claims which are within the federal jurisdiction conferred on the district court by 28 USC, §1331.[15]

B.

We also hold that considerations of comity and abstention did not require the district court to relinquish jurisdiction.

Comity is a principle of long standing:

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.
>
> • • • •
>
> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control,

[15]Jones' argument that the district court improperly assumed jurisdiction of a *res* already in the control of the state courts is without merit. Suits for injunctions are *in personam,* not *in rem, Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195 (1935), and state and federal courts having concurrent jurisdiction are "free to proceed in [their] own way • • •, without reference to the proceedings in the other court. • • • The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline v. Burke Construction Co.,* 260 U.S. 226, 230 (1922). We observe that in any case Rath's claims were made in district court thirteen days before Rath's state cross-complaints were filed. The controversy here is not over any property right or status in the *bacon,* but over the enforcement of state laws which affect how the bacon is sold.

> whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. *Ponzi v. Fessenden,* 258 U.S. 254, 259-60 (1921).

This circuit has defined the rule of comity as "merely recognizing exclusive jurisdiction in the court first acquiring jurisdiction of any action." *Gregg v. Winchester,* 173 F.2d 512, 513 (9th Cir. 1949). Under these rules and in the present circumstances, the principle of comity does not suggest that the district court should have declined to hear Rath's claims. The subject matter of the litigation before us consists of the *federal questions* raised by Rath in its complaint. These federal questions were first taken into the control of a court when Rath filed its complaint in the district court on March 17, 1972. No state court could have acquired jurisdiction over this subject matter until Rath answered and filed its cross-complaints in the state courts on March 30, 1972. Our conclusion is reinforced by the actions of the District Court of Appeal in the Riverside action twice giving *res judicata* effect to the federal district court judgment. If, as Becker and Christensen contend, the only matter preventing the first Riverside judgment, dismissing Rath's cross-complaint against Jones, from being given preclusive effect as a final judgment is Cal. Code of Civ. Proc. §1049,[16] the California appellate court would not have directed the trial court to abandon its position and to follow the federal judgment, which, since it had been appealed, was just as "final" as the Riverside judgment if evaluated under California law. We do not see here the federal-state conflict that the comity doctrine seeks to avoid. The district court acquired jurisdiction over the federal question prior to the state courts, and very scrupulously avoided deciding even tangentially the constitutionality of the California statutes and regulations or whether the actions of the inspectors were in compliance with state law. The state courts have not questioned the right of the district court to take the action it did and held the federal judgment entitled to preclusive effect in the state courts on the particular issues litigated in the federal court.

[16]Cal. Code of Civil Procedure §1049:

> An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, • • •.

In applying the abstention doctrine a federal district court has *discretion* in *declining* to exercise or *postponing* the exercise of jurisdiction it already has in deference to a state court resolution of underlying issues of state law. *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941). Abstention is appropriate only where the issue of state law is uncertain, *Harman v. Forssenius,* 380 U.S. 528 (1965), and where "the delay and expense to which the application of the abstention doctrine inevitably gives rise" can be justified. *England v. Board of Medical Examiners,* 375 U.S. 411, 418 (1964). However, abstention is not automatic whenever a question of state law may be involved. As the Court said in *Baggett v. Bullitt,* 377 U.S. 360, 376-77 (1964), a case in which the Court considered abstention to be unnecessary:

> In the bulk of abstention cases in this Court, • • • the unsettled question of state law principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation.

This statement reflects the judicial policy of avoiding the adjudication of federal constitutional questions unless they are ripe and are squarely presented by the record.

"The basic question involved in [federal preemption] cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co. v. Wickham,* 382 U.S. 111, 120 (1965). Thus we do not have a situation where a state law interpretation by a state court may eliminate a federal constitutional question. Cf. *Reetz v. Bozanich,* 397 U.S. 82 (1970). There is no contention by Becker, Jones, or Christensen that California law is unclear or ambiguous or that the construction of California law in the state courts will obviate a decision on Rath's federal preemption claim. The California statutes and regulations apply to Rath without question. We think this case is akin to *Harman v. Forssenius,* supra, in which the Court said: "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal • • • question, it is the duty of the federal court to exercise its properly invoked jurisdiction. *Baggett v. Bullitt,* 377 U.S.

360, 375-379." We hold that the district court did not abuse its discretion in refusing to abstain.

II.

In holding 9 CFR 317.2(h)(2) invalid, the district court said:

> [The section] is void for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life. 357 F. Supp. at 534.

Rath alleges two bases of error: (1) the validity of the regulation was not put in issue by the parties below and should not have been considered by the district court; and (2) the district court erred on the merits of the issue.

Rule 16 of the Federal Rules of Civil Procedure provides that "[t]he court shall make an order • • • which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and *such order* when entered *controls the subsequent course of the action* unless modified at the trial to prevent manifest injustice." [Emphasis added.] The pretrial order entered by the court with the consent of the parties in the Becker action does not name as an issue the validity of 9 CFR 317.2(h)(2); nor, for that matter, do the pleadings and motion papers in the Jones action. The first appearance of the issue in the Jones action was at the argument on the motions for summary judgment:

> THE COURT: The question is, is the regulation, and that is (h)(1) and (2) and particularly (2), that is 317.2(h)(2), is it a valid regulation.
>
> MR. KEIR [Counsel for Jones]: Well, we don't challenge the validity of (h)(2).
>
> THE COURT: You don't? You don't? I have some serious questions about it.
>
> MR. KEIR: Maybe I should retract that for the record. Frankly, I hadn't considered whether it is valid or not. I merely submit to the court, and this is the position we have taken right along, is that (h)(2) is an innocuous provision.

It was not until the close of the trial of the Becker action that the district judge requested argument on the issue, and by so doing put the issue before the parties.

Ordinarily, issues not squarely presented in the pleadings and motion papers or not preserved in the pretrial order are considered to have been eliminated from an action. See, *e.g.*, *L & E Co. v. United States ex rel. Kaiser Gypsum Co.*, 351 F.2d 880 (9th Cir. 1965); *Fowler v. Crown Zellerbach Corp.*, 163 F.2d 773 (9th Cir. 1947; see also 3 *Moore's Federal Practice* ¶16.19. This is particularly true in a declaratory judgment action, where the court is called upon to adjudicate only those matters as to which the parties ask that their rights be determined. In this case, however, the parties have fully briefed and argued this issue both here and before the district court. In their consolidated post-trial memorandum, Becker and Christensen requested a declaration that 9 CFR 317.2(h)(2) was invalid. Rath does not claim that the court's *consideration* of the issue—as opposed to its *decision* on the issue, with which Rath differs—has resulted in any actual prejudice to it, nor did Rath object in its reply brief in the district court to consideration of the issue. By failing to object, Rath may be deemed to have acquiesced in an expansion of the issues by the court from those set forth in the pretrial order. Furthermore, the issue, as discussed below, is one of "facial" invalidity under the 5th Amendment which does not require a fully developed evidentiary basis for its resolution. Cf. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). We note the public importance of this question, and the possibility of review of our judgment herein. Since a controversy presently exists between the parties on the issue, and since the judgment of the district court turned in large part on its resolution of this issue, we proceed to the merits of the controversy.

Although we have some doubts as to the applicability of the "void-for-vagueness" doctrine in its traditional formulation[17] to

[17] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926):

> That the terms of a *penal* statute creating a new *offense* must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. [Emphasis added.]

See also *United States v. Harriss*, 347 U.S. 612, 617 (1954).

this non-criminal situation, the parties do not question the doctrine's applicability to this case. However, we need not decide its applicability, since we are of the opinion that the regulation passes muster when the due process standards enunciated by the criminal cases in the economic area are applied to it. There is no claim that 1st Amendment rights are involved, the presence of which would necessitate stricter scrutiny by us. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

The crux of the district court's holding of invalidity can be found in the following [357 F. Supp. at 534]:

> What [*United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932)], *supra*, is telling us is that the *statutory* delegation is viable. It does not give viability to a redelegation that is subject to varying degrees of reasonableness. The statute gives the Secretary the power of definition of "reasonable variations." The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal laws. [Footnote omitted; emphasis in original.]

Neither the statute nor the regulations contain quantitative statements of what variations will be considered reasonable.[18] There is likewise no evidence tending to show how much weight variation is considered reasonable by the trade. In the absence of evidence of how the regulation is applied, the burden rests on the parties challenging the regulation, Becker and Christensen, to show that the regulation is incapable of setting a standard of enforcement on its face.[19] Their challenge fails for two independent reasons, which correspond to the separate rationales underlying the portions of the district court's opinion reproduced supra.

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[18]Rath offered as evidence a USDA manual purporting to contain the quantitative variations to be permitted by USDA inspectors, which the court excluded as irrelevant and as not having been promulgated by the Secretary of Agriculture under the Wholesome Meat Act by publication in the Federal Register. Rath does not urge this ruling as error, and we shall not comment on it. Except for this manual, however, Rath concedes that the quantitative scope of "reasonable variations" recognized by the Secretary is nowhere set forth in any writing.

[19]*United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

The district court seems concerned with "reasonableness" as a standard for guiding conduct. This standard is of ancient provenance in English and American law and is not obnoxious in itself to the Fifth Amendment of the Constitution. In the ordinary negligence case, for instance, the sole difference between no liability and a sizeable penalty in the form of damages may be whether the acts in issue are considered those of a *reasonable* man by a jury long after the fact. A more telling analogy is found in the criminal application of the Sherman Act, 15 USC, §1 et seq. The English courts distinguished legal from illegal contracts restraining trade by whether the restraint imposed was reasonable. *Mitchel v. Reynolds*, 1 P. Williams 181, 24 Eng. Rep. 347 (King's Bench, 1711); see discussion in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *mod. and aff'd.*, 175 U.S. 211 (1899); and *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911). *Standard Oil*, supra, construed the prohibition of the Sherman Act against "[Any] contract, combination • • •, or conspiracy, in restraint of trade • • •," to apply only to those restraints which are unreasonable as understood in the common law. When the criminal application of the Sherman Act was challenged, in *Nash v. United States*, 229 U.S. 373 (1912), on the ground that "the crime defined by the statute contains in its definition an element of degree as to which estimates may differ," Mr. Justice Holmes, speaking for the Court, said:

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. • • • We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act. 229 U.S. at 378-79.

See also *United States v. Ragen*, 314 U.S. 513, 523-24 (1942). More recently, the Supreme Court upheld against a constitutional challenge a criminal proceeding under §3 of the Robinson-Patman Act, 15 USC, §13a, which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." *United States v. National Dairy Corp.*,

372 U.S. 29, 34-36 (1963).[20] We conclude, therefore, that the regulation, which permits "reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices," has not been shown by the parties claiming its invalidity to be impossible of application without depriving those to whom it is applied fair notice of the practices which are not within the permission of the regulation. The nature of the recognized variations is clearly set forth; Becker, Jones, and Christensen have not alleged that those subject to the regulation, such as Rath,[21] could not perceive the conditions under which the regulation would permit reasonable variations in weight to be recognized. The characterization of the recognized variations as "reasonable" is not constitutionally infirm in itself, as the cases show. Our conclusion is confirmed by the holding of the Supreme Court in *Parker v. Levy*, 417 U.S. 733 (1974), that Article 134 of the Uniform Code of Military Justice, which punishes "[a]ll disorders and neglect to the prejudice of good order and discipline in the armed forces," is not void for vagueness. See also *Ricci v. United States*, 507 F.2d 1390 (Ct. Cl. 1974). Application of the regulation, *as gauged on this record*, does not offend the due process clause of the 5th Amendment, as it has not been shown that the regulation fails to give fair notice of the variations to be permitted under it.

The second prong of the district court's criticism of the regulation is that it constitutes an impermissible redelegation to USDA field inspectors of the authority granted by Congress to the Secretary to determine what variations caused by gain or loss of moisture, etc., were to be permitted. This conclusion is error, as the legislative history and precedent demonstrate.

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[20]The Court did not uphold the statute on its face, but only as applied to the acts charged in the indictment. The Court did, however, distinguish the case from *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921), in which a statute proscribing "any unjust or unreasonable rate or charge" was invalidated. The Court saved §3 by finding that the statute made clear reference to the nature of the conduct prohibited, i.e., that which was intended to destroy competition, etc. 372 U.S. at 35.

[21]9 CFR 302.1(a) provides:

> (a) Inspection under the regulations in this subchapter [which includes 317.2(h)(2)] is required at:
>
> (1) Every establishment • • • in which any products of • • • carcasses of livestock • • • are prepared for transportation or sale as articles of commerce, which are intended for use as human food.

In enacting the Wholesome Meat Act of 1967, Congress made additions to the statutory framework underlying federal meat inspection programs and standards. In particular, Congress created a series of definitions modeled on the definitions used in the Food, Drug, and Cosmetic Act, 21 USC, §301 et seq. In S. Rep. No. 799, 90th Cong., 1st Sess.,[22] the Committee said with respect to Sec. 1(n) of S. 2147, which became 21 USC, §601(n), the statutory basis of the questioned regulation:

> (n) *Misbranded.*—The definition of this term not heretofore used in the Meat Inspection Act, is discussed in connection with section 12. It is based on the definition of the same term in the Federal Food, Drug, and Cosmetic Act and is identical except that——
>
> In new section 1(n)(5) the introductory phrase is slightly different in that it refers to "other container" besides packages and requires a label "showing" rather than containing" specified information; and in the proviso, reasonable variations and exemptions "may" instead of "shall" be allowed by the Secretary of Agriculture instead of the Secretary of Health, Education, and Welfare. Also an internal reference to a clause is made in different terms than in the Federal Food, Drug, and Cosmetic Act.
>
> • • • •

It is therefore proper for us to consider the history and construction of the Food, Drug, and Cosmetic Act prior to 1967 in interpreting the scope of the Secretary's power to promulgate regulations.

In *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), the Supreme Court had occasion to construe the Food and Drug Act and regulations thereunder, as they were in force at that time. The relevant portion of the Act provided:

> [A]n article of food shall be deemed misbranded——
>
> • • • •
>
> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however*, That reasonable variations shall be per-

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[22]*U. S. Code, Cong. and Admin. News*, 90th Cong., 1st Sess., p. 2188-2213 (1967).

mitted and tolerances and also exemptions as to small packages shall be established, by rules and regulations made in accordance with • • • this Act.

The regulation stated:

(i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:

(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing in compliance with good commercial practice.

• • • •

(3) Discrepancies in weight or measure, due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

The resemblance between the present statute and regulation and the statute and regulation in force in 1932 is apparent.

The Court held that the substantive standard created by the Act was that packages be marked plainly and conspicuously with their weights, and that the statutory proviso gave the involved Secretaries the administrative authority to permit reasonable variations from this hard and fast rule. The Court continued [287 U.S. at 84]:

> Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances *and variations* [italics supplied] from the quantity of the contents marked on the package shall be allowed: . . ." Then follows an enumeration

> of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress.

The Court did not question the authority of the Secretary to promulgate the regulation. In the forty-two years since the *Shreveport Grain* case Congress has not changed its delegation of authority to the Secretary to "permit reasonable variations," nor have the regulations promulgated expressly under that authority included any quantitative expressions of the variations to be permitted.

The question, therefore, is: Has the Secretary failed to heed the intent of Congress in giving him authority to permit reasonable variations by declining to put numerical limits on the variations he and his representatives will permit in the enforcement of the substantive standard of the Act? In the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, Congress reenacted the provisions of the prior Act in substantially identical terms to those before the Court in *Shreveport Grain*.[23] It has been held that Congress gives a regulation the force and effect of law by reenactment of the statutory provision to which it pertains. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939). We note also the presumption that reenactment of a statutory provision by Congress without significant change indicates its approval of prior judicial interpretation of that provision. *United States v. Douglas Aircraft Co.*, 510 F.2d 1387 (CCPA 1975). Becker, Jones, and Christensen have adduced nothing to overcome the conclusion that the regulation is a valid exercise of the authority delegated to the Secretary

[23] Sec. 403. A food shall be deemed misbranded—

• • • •

(e) If in package form unless it bears a label containing • • • (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations prescribed by the Secretary.

by Congress. The regulation must be presumed valid, and the burden is on those contending its invalidity to persuade us otherwise. Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's interpretation of the scope of his powers. See *Flood v. Kuhn*, 407 U.S. 258, 283 (1972); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). We do not, for the above reasons, concur in the district court's analysis of *Shreveport Grain*, and hold that the district court erred in finding 9 CFR 317.2(h)(2) invalid.

III.

The central issue in this litigation is whether sections of the California statute and regulations promulgated thereunder are preempted by the Wholesome Meat Act of 1967 and 9 CFR 317.2 (h)(2). The district court based its holding of preemption on its finding that the statistical variations allowed by California from the accurate weight standard imposed by 21 USC, §601(n)(5), in the absence of valid regulations permitting reasonable variations thereunder, created a net weight labeling standard "different than" the federal standard. We agree with the holding, but not with the reasoning on which it was based.

"Our principal function is to determine whether, under the circumstances of this case [the state regulations and] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Wholesome Meat Act and delegating to the Secretary the power to make regulations thereunder. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The inquiry in this case will follow the lines set forth in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963):

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained.

21 USC, §678, was enacted as part of the Wholesome Meat Act of 1967, Pub. L. 90-201, §408, 81 Stat. 600. We are of the opinion that in it "Congress has unmistakenly so ordained." Accord, *Armour and Company v. Ball*, 468 F.2d 76 (6th Cir. 1972). This

conclusion follows from the clear language and legislative history of 21 USC, §678. The first part of the section reads in relevant part:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are *in addition to, or different than those made under this chapter may not be imposed by any State* • • •, except that any such jurisdiction may impose record-keeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, *labeling*, packaging, or ingredient *requirements in addition to, or different than*, those made under this chapter may not be imposed by any State • • • with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter • • •. [Emphasis added.]

The report of the Senate Committee, S. Rep. No. 799, 90th Cong., 1st Sess., states:[24]

> The committee feels that Federal standards must be required of all meat and meat food products sold for human consumption in this country.
>
> • • • •
>
> However, the committee wants it clearly understood that the requirements on wholesomeness, additives, labeling, and the other Federal regulations are not to be compromised and must be at least equal to Federal standards.
>
> • • • •
>
> Section 408 [codified at 21 USC, §678] would exclude States • • • from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared in accordance with title I of the act • • •.

This language clearly shows the intent of Congress to create a uniform national labeling standard, under the definitions set forth in the Wholesome Meat Act, including the definition of "mis-

[24] 2 *U.S. Code Cong. and Admin. News*, 90th Cong., 1st Sess., 2191, 2207 (1967).

branding" in §601(n). The express language of §678 implements this clear Congressional intent.

In the absence of regulations under the Act the statutory labeling[25] standard under the Act is that the label reflect "accurate" weight, as the district court held. 9 CFR 317.2(h)(2) adds to this federal standard the condition that "reasonable variations caused by loss or gain of moisture during the course of good distribution practices • • • will be recognized." The California statutes and regulations must impose such a standard of labeling on Rath or they are preempted by federal law as requiring weight information on labels "different than" that required by federal law.

Cal. Bus. and Prof. Code §12211 establishes the following standard: "that the *average* weight or measure of the packages or containers in a lot of any such commodity sampled shall not be *less*, at the time of sale or offer for sale, than the net weight or measure stated upon the package." (Emphasis added.) This section also provides for the promulgation of regulations to govern the sampling and weighing procedures. The California regulations, the district court concluded, provide only for a statistical variation from the absolute accurate weight and make no reference to loss of moisture from the packages of bacon (or other products that lose moisture, for that matter) experienced between the time the bacon is weighed in the plant and the time that California inspectors weigh the bacon at the retail store. We agree with the district court that Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code, ch. 8, subch. 2, Art. 5, impose labeling standards "different than" those under federal law and may not be enforced.

Jones, Becker, and Christensen claim that this holding infringes on the legitimate interests of the State of California protecting its citizens from short-weight meat products. We cannot agree. Christensen and Becker recognized the true situation in their brief: "Christensen and Becker submit that by [21 USC, §678] Congress sanctioned the adoption by the states of laws (statutes and regu-

[25]Jones' argument that California imposed no "labeling" requirements, but rather sought to prevent "misbranding" under Cal. Bus. and Prof. Code §12211, is strained. 21 USC §601(n) read as a whole, defines violation of its "labeling" requirements as "misbranding." As we hold below, the federal standards, which include definitions of terms, prevail over conflicting State standards.

lations) which impose the same *standard* required by the Wholesome Meat Act • • • and which are enforced by means of state enforcement procedures. (Emphasis in original.) The concluding portion of §678 reads in relevant part as follows:

> • • • but any State • • • may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment • • •. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Our holding does not diminish the Congressional grant in §678 to the States of enforcement jurisdiction concurrent with the Secretary over misbranded articles outside federally inspected establishments, *if the States do not impose labeling and other requirements "in addition to or different than" the federal standards when exercising their concurrent jurisdiction.* We have merely held that California cannot exercise its concurrent jurisdiction through the particular standards established by §12211 and Art. 5. California is free to enact other statutes and regulations which do not offend §678. It must be further understood that the only matters at issue are net weight labeling standards; our judgment herein does not pertain to other matters which are or may be regulated by the State of California.

IV.

Rath urges as error the holding of the district court that the federal net weight standard set by 21 USC, §601(n)(5), "can be applied to packages of meat or meat food products at the ultimate end of a meat processor's distribution system—the retail store." Implicit in this holding is that California may exercise the concurrent enforcement jurisdiction permitted it by 21 USC, §678, by the imposition of appropriate standards through the inspection of packages at the supermarket.

Rath's position is at odds with the intent of the Wholesome Meat Act and with the grant of concurrent enforcement jurisdic-

tion to the States. 21 USC, §602, states that "It is essential in the public interest that the health and welfare of *consumers* be protected by assuring that meat and meat food products *distributed to them* are wholesome, not adulterated, and properly marked, labeled, and packaged." (Emphasis added.) 21 USC, §624, gives the Secretary the power to promulgate regulations governing the storage and handling of meat and meat food products "to assure that such articles will not be • • • misbranded *when delivered to the consumer.*" (Emphasis added.) The emphasized portions make it clear to us that Congress intended to continue the protection provided under the Wholesome Meat Act to the point at which the consumer receives the meat and meat food products subject to the Act, i.e., at the retail food store level.[26]

21 USC, §673(a) provides for federal seizure of misbranded meat and meat food products which are "held for sale [i.e., in a retail store] in the United States after • • • transportation [in commerce]," and §673(b) indicates that federal seizure does not "derogate from authority for condemnation or seizure conferred by • • • other laws." The concurrent jurisdiction granted by 21 USC, §678, to enforce appropriate State standards outside of federally inspected establishments would be a nullity if it were to be construed to prevent State enforcement at a level of distribution which Congress clearly intended to be subject to *non*-exclusive federal regulation.

Rath, however, argues that the federal net weight standard requires that the label be accurate only when the product leaves the establishment, relying on 21 USC, §607(b).[27] Accordingly, says Rath, the State may not require conformance with the federal standard of accurate weight, with reasonable variations, etc., considered, past that point. Such an argument renders meaningless the allowance of reasonable variations for gain or loss of moisture *during the course of good distribution practices.* Why

[26]See also, 9 CFR 317.2(b), promulgated under 21 USC, §601(n)(6), which provides in part:

> [Any label term must be] likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

[27]"(b) All • • • meat and meat food products inspected at any establishment under the authority of this subchapter • • • shall *at the time they leave the establishment* bear • • • the information required under paragraph (n) of section 601 of this title." (Emphasis added.)

would the federal scheme consider distribution practices to be relevant at all if the federal net weight labeling standard applied only at the point at which distribution of the product commenced? We cannot attribute such a restrictive reading to §607(b). Rath's objections are met by the reasonable variations allowance; whatever weight variation results from gain or loss of moisture occurring in the chain of distribution from packing plant to retail store *must*, under 9 CFR 317.2(h)(2), be taken into account in determining whether the net weight labeling of a package at retail complies with the federal standard.

V.

After the district court filed its order enjoining the enforcement of Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5, Christensen promulgated a new regulation, Art. 5.1, to

> • • • apply only during the proceedings [of the instant case]. This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of meat and meat products • • •.

The district court refused to modify its order to enjoin the enforcement of Art. 5.1 and Cal. Bus. and Prof. Code §12607, the alleged statutory authority for the regulation. Rath requests us to enlarge the declaration and injunction to hold invalid and enjoin the enforcement of these provisions as well.[28]

§12607 provides:

> Whenever a consumer commodity is offered for sale, exposed for sale, or sold without a statement of net quantity appearing thereon • • •, the sealer shall in writing order the commodity off sale and require that a correct statement of net

[28]Rath did not appeal separately from the denial of its motion to amend the judgment. The issue was preserved by Rath's initial notice of appeal, since the injunction granted by the district court was narrower in scope than the relief requested by Rath. Rath's notice of appeal specifically noted the limitation of relief. We also note that the district court, 357 F. Supp. at 533, relied on Becker, Jones, and Christensen's citation of §12211 as the primary statutory authority in fashioning the remedy. By changing their statutory basis of authority, they scarcely should argue that Rath has the burden of foreseeing what regulations they will use next.

quantity be placed on the commodity before the same may be released by the sealer.

This section, standing by itself, is innocuous if "net quantity" is a designation of contents by weight which is not "in addition to or different than" the federal net weight labeling requirements. Art. 5.1 shows that the interpretation of "net quantity" enforced in California is "different than" the federal standard:

> 2940.1. *Package Inspection.* (a) Each sealer of weights and measures shall, within his county, inspect packages of meat and meat products and poultry and poultry products to determine whether the label weight stated on the package is accurate at time of inspection.
>
> (b) The determination of accuracy shall be made by weighing all of the usable product within the container, exclusive of wrappers and packing substances.
>
> (c) As an alternate procedure to the procedure stated in subsection (b), the sealer of weights and measures shall establish an accurate tare weight for the containers within a lot of packages and weigh each of the inspected packages. He shall:
>
> (1) Remove 3 packages from the lot at random and weigh each of the unopened packages;
>
> (2) Remove from each of the 3 containers all of the usable product, exclusive of wrappers and packing substances; and
>
> (3) Determine the tare weight for each of the 3 packages separately by subtracting the weight of the usable product from the gross weight.
>
> He shall weigh separately each of the packages in the lot to be inspected and apply as a tare weight for purposes of the lot the lowest tare weight obtained by the above procedure.
>
> (d) For purposes of the procedure specified in subsection (c), a lot is defined as a group of packages assembled in one place, of the same product and brand, in apparently identical containers, bearing the same statement of weight.

It is clear beyond cavil that Art. 5.1 makes *no* allowance for variations from accurate weight *whatever*. Since the federal standard, by virtue of 9 CFR 317.2(h)(2), requires recognition of reason-

able variations due to gain or loss of moisture, etc., Art. 5.1 is preempted by the federal standard and may not be enforced. To the extent that §12607 is interpreted to permit a definition of "net quantity" which does not recognize the reasonable variations allowed by the federal standard, it is likewise preempted and may not be enforced.[29] The applicability of Art. 5.1 only during the "proceedings" of this case does not deter us from considering its enforcement improper, since we have no control over the interpretation of its period of applicability either administratively or by a state court except by assuring by injunction that Art. 5.1 will not be enforced at all.

VI.

CONCLUSION

In recapitulation we hold:

(1) that the district court had jurisdiction over the subject matter of this case, personal jurisdiction being conceded;

(2) that the district court erred in invalidating 9 CFR 317.2(h)(2);

(3) that the Wholesome Meat Act of 1967, 21 USC, §601 et seq., and 9 CFR 317.2(h)(2) preempt Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5, and that Becker, Jones, and Christensen were properly enjoined from enforcing those sections;

(4) that the district court correctly held that state standards not in addition to or different than the federal net weight

---

[29]Section 12607 is not saved by Cal. Bus. and Prof. Code §12613, which provides:

> If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the act of Congress entitle[d] "Fair Packaging and Labeling Act" (P.L. 89-755; 80 Stat. 1296, 15 U.S.C. 1451-1461) or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement is a part of this chapter.

No California standard, even if of equal or greater stringency than the federal standard, may be enforced if it is *different* from the federal standard. As enforced in Art. 5.1, §12607 is different from the Wholesome Meat Act standard, whether less stringent or not. The Fair Packaging and Labeling Act is, of course, not relevant to this case.

labeling standard may be enforced by appropriate State procedures at the retail level; and

(5) that 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5.1, is preempted by federal law, that Cal. Bus. and Prof. Code §12607 is preempted by federal law to the extent indicated in part V, supra, and that their enforcement should be enjoined.

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and the case is remanded for entry of an amended order in conformance with this opinion.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 11-19-75 400

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation, *Plaintiffs-Counterdefendants-Appellants,* vs. JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures, *Defendant-Counterclaimant-Appellee.*	No. 74-1051
GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation, *Plaintiffs-Counterdefendants-Appellees,* vs. JOSEPH W. JONES, as Director of the County of Riverside Department of Weights and Measures, *Defendant-Counterclaimant-Appellant.*	No. 73-3583

OPINION

[October 29, 1975]

Appeal from the United States District Court
for the Central District of California

Before: BROWNING and TRASK, Circuit Judges, and RICH,* Judge, United States Court of Customs and Patent Appeals.

RICH, Judge:

This suit was brought by the three plaintiff corporations, General Mills, Pillsbury, and Seaboard Allied Milling, hereinafter termed "the millers," to enjoin the enforcement of certain California statutes and regulations pertaining to the labeling by weight

*The Honorable Giles S. Rich, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

of packaged foods at retail. Plaintiffs also seek declarations under 28 USC §2201 and §2202 that these statutes and regulations are preempted by federal law and that the means of enforcement employed, off-sale orders under Cal. Business and Professions Code §12211, violated the due process clause of the Fourteenth Amendment, unreasonably burdened interstate commerce, and were imposed in violation of California law. The millers requested a three-judge district court pursuant to 28 USC §2281.[1] Defendant Jones, as Director of the County of Riverside Department of Weights and Measures, is the official responsible for the enforcement of state weights and measures laws in his county. Jurisdiction in the district court was based on 28 USC §1331(a), as the millers alleged that a case or controversy arising under the laws or Constitution of the United States involving more than $10,000 was presented; the existence of the jurisdictional amount is not disputed.

The district court, in an unreported memorandum and order, attached hereto as an Appendix, granted in part the relief requested, and the parties filed cross-appeals from the judgment. We have jurisdiction of these appeals under 28 USC §1291.

This case is a companion to *Rath Packing Co. v. Becker*, Nos. 73-2481, etc., decided concurrently herewith. For the sake of brevity in this opinion we shall refer at times to our opinion in *Rath*.

Background

This case concerns the packaging and weighing of flour sold to consumers for home use. The millers manufacture, package, label, and distribute in interstate commerce wheat flours, which are within the definition of "food" in the federal Food, Drug, and Cosmetic Act (FDCA), 21 USC §301 et seq., and are considered

[1]Section 2281 provides:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

"consumer commodities" under the federal Fair Packing and Labeling Act (FPLA), 15 USC §§1451-1461.

Packaged flour is hygroscopic, and gains or loses moisture depending on the ambient humidity, unless packaged in airtight containers. If the relative humidity of the surrounding air is less than 60%, flour loses moisture, and hence weight. The converse is true at relative humidities above 60%. During the course of good distribution practices the ambient relative humidity if often less than 60%, and the packages of flour often lose weight. At the time the flour was packed, it contained 13-14% water by weight, which is within the identity standard for flour promulgated by the Secretary of Health, Education, and Welfare pursuant to 21 USC §341 in regulations set forth at 21 CFR 15.1. Jones conceded at argument before the district court that the compliance of the packages of flour with the federal weight labeling standards discussed *infra* when they left the millers' plants was not a material issue of fact. We take this to mean that, for the purposes of this case, the millers' flour was correctly labeled as to net weight under federal law when it left their plants.

Federal Statutes and Regulations

The federal statutory provisions covering the labeling of flour are found in the FDCA and the FPLA. Section 403 of the FDCA, 21 USC §343, provides:

> A food shall be deemed misbranded—
>
> • • • •
>
> (e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

In 21 CFR 1.8b(q) the Secretary purported to implement the proviso:

> (q) The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of

the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Under the FPLA, Section 3, 15 USC §1452, provides:

(a) It shall be unlawful for any person engaged in the packaging or labeling of any consumer commodity (as defined in this chapter) for distribution in commerce, or for any person (other than a common carrier for hire, a contract carrier for hire, or a freight forwarder for hire) engaged in the distribution in commerce of any packaged or labeled consumer commodity, to distribute or cause to be distributed in commerce any such commodity if such commodity is contained in a package, or if there is affixed to that commodity a label, which does not conform to the provision of this chapter and of regulations promulgated under the authority of this chapter.

Section 4 of the FPLA, 15 USC §1453, contains the FPLA's labeling standards:

(a) No person subject to the prohibition contained in section 1452 of this title shall distribute or cause to be distributed in commerce any packaged consumer commodity unless in conformity with regulations which shall be established by the promulgating authority pursuant to section 1455 of this title which shall provide that—

• • • •

(2) The net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label • • •.

The FPLA is tied to the FDCA by Section 7 of the FPLA, 15 USC §1456:

(a) Any consumer commodity which is a food, drug, device, or cosmetic, as each such term is defined by section 321 of Title 21, and which is introduced or delivered for introduction into commerce in violation of any of the provi-

sions of this chapter, or the regulations issued pursuant to this chapter, shall be deemed to be misbranded within the meaning of sections 331 to 337 of Title 21 • • •.

California Laws and Regulations

The California regulatory scheme depends upon two provisions of the California Business and Professions Code. Section 12211 of the Code provides in material part:

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

• • • •

Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of • • • [various sections] of the Government Code; provided, that the *average weight* or measure of the packages or containers in a lot of any such commodity sampled *shall not be less*, at the time of sale or offer for sale, *than the net weight* or measure stated upon the package, and provided further, that *said rules or regulations* applicable to food as defined in Section 26450 of the Health and Safety Code, insofar as possible, *shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated* by the Department of Health, Education, and Welfare, Food and Drug Administration, *under the provisions of the Federal Food, Drug and Cosmetic Act.*

• • • •

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented. [Emphasis added.]

Section 12607 of the Business and Professions Code, on which Jones also relies, provides in material part:

> Whenever a consumer commodity is offered for sale, exposed for sale, or sold without a statement of net quantity appearing thereon * * *, the sealer shall in writing order the commodity off sale and require that a correct statement of net quantity be placed on the commodity before the same may be released by the sealer.

The regulations implementing Sections 12211 and 12607 are in 4 Cal. Administrative Code ch. 8, subch. 2, as in *Rath*. The weighing and off-sale procedures described in our *Rath* opinion as applicable to bacon also apply to the flour herein, except, of course, that the tare in this case is the weight of an empty paper flour bag.

Proceedings Below

At various times from October to December 1972, inspectors under Jones' supervision examined at Riverside County food distributors bags of flour manufactured and packed by the millers and, finding that bags in certain lots were short weight under the California statutes and regulations described *supra*, ordered those lots of flour off sale. Jones ordered additional lots of flour off sale in July 1973, after the commencement of this action.

In April 1973 the millers brought this action against Jones for declaratory and injunctive relief against Jones' acts. Jones counterclaimed, alleging that he had ordered off sale some 30,618 bags of flour totalling 191,731 lbs. and requesting declarations antithetical to those requested by the millers and an injunction against continuing violations of California law by the millers. There are no pending or concluded proceedings in the state courts pertaining to the ordering off-sale of the millers' flour, so the jurisdictional problem discussed in part I of our *Rath* opinion is not present in this case.

The case was decided on the basis of cross-motions for summary judgment supported by affidavits. As shown in the Appendix to this opinion, the district court granted in part the relief requested. Both parties appealed the determinations adverse to them.

I

Before considering the merits of this controversy we must decide whether the single district judge correctly denied the millers' motion for the convening of a three-judge district court under 28 USC §2281. If the district court was in error, we would have to remand this case for a new trial by a three-judge court, as the single judge below would have lacked jurisdiction on the subject matter. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 153 (1963); C. Wright, *Law of Federal Courts*, §50 (2d Ed., 1970). We hold that the action was properly heard and decided by a single judge for the reasons discussed below.

In a suit to enjoin the enforcement of a state law or regulation claimed to be contrary to the federal constitution, 28 USC §2281 has been construed to require a three-judge district court to hear the action only if the constitutional question presented is substantial. A question is insubstantial if it is "obviously without merit or because its unsoundness so clearly results from the previous decisions of this [the United States Supreme] court as to foreclose the subject * * *." *Ex parte Poresky*, 290 U.S. 30, 32 (1933); *Swift & Co. v. Wickham*, 382 U.S. 111, 115 (1965); *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255 (1938).

The contention that California's regulatory scheme is rendered invalid by the Commerce Clause *alone* is not substantial. The regulation of weights and measures has historically been, and is now, a matter of local concern and within the competent exercise of the police power of the States. See Judge Friendly's historical analysis for the district court in *Swift & Company v. Wickham*, 230 F. Supp. 398, 402-403 (S.D. N.Y. 1964); *appeal dismissed*, 382 U.S. 111 (1965), *aff'd.*, 364 F.2d 241 (2d Cir. 1966); see also *Savage v. Jones*, 225 U.S. 501 (1912). Any holding that the enforcement of state weights and measures regulations by California unreasonably burdens interstate commerce is foreclosed by the Supreme Court's decision in *Sligh v. Kirkwood*, 237 U.S. 52 (1915), in which the Court held that a Florida law which made the delivery of immature citrus fruit for shipment in interstate commerce a criminal offense was a valid exercise of Florida's police power and did not unreasonably burden interstate commerce. We note a claim that a state law is invalid because of conflict with federal law enacted pursuant to the power of Congress

under the Commerce Clause to regulate interstate commerce does *not* raise a constitutional question under the Commerce Clause requiring resolution of the issue by a three-judge court. *Swift & Co. v. Wickham, supra,* 382 U.S. at 120, 128.

Similarly, the millers' contention that the ordering of their flour off sale by Jones without a prior hearing violates Fourteenth Amendment due process is without substance. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950), the Court held that the seizure without a prior hearing of allegedly misbranded articles under Section 304(a) of the Food, Drug, and Cosmetic Act, 21 USC §334(a), did not violate due process. This holding was specifically approved by the Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), as one directed to those special circumstances in which the important governmental or general public interest permits postponement of notice and an opportunity for a hearing without the deprivation of due process. See *Fuentes v. Shevin*, 407 U.S. 67, 90-93 (1972), for a discussion of the range of circumstances in which postponement of hearing is consistent with due process requirements.[2] Since California has adequate procedures by which the propriety of off-sale orders may be tested after the fact, by petition for writ of mandamus or action for injunction under state law, this contention of the millers is foreclosed and without substance. We perceive no difference in substance between California's undisputed interest in protecting its citizens from packaged articles which bear inaccurate weight information on them and the interests discussed in *Sniadach* and *Fuentes* whose nature permits seizure of property without prior hearing.

II

In finding that 21 CFR 1.8b(q), *supra,* was invalid, the district court referred to the reasoning it employed in *Rath Packing Co. v. Becker*, 357 F. Supp. 529 (C.D. Cal. 1973), to invalidate the analogous regulation under the Wholesome Meat Act of 1967, 21

[2]The subsequent uncertainty in the scope of the *Fuentes* holding created by *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), and fanned afresh by *North Georgia Finishing Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), does not affect the continuing validity of Part VI of the Court's opinion in *Fuentes.*

USC §601 et seq. In *Rath* the district court said, 357 F. Supp. at 534 (emphasize in original, footnotes omitted):

> Defendants argue, however, that section 317.2(h)(2) is void for vagueness; that, therefore, we are left with the absolute standard, "an accurate statement of . . . weight". Though valid, this argument does not end the inquiry in favor of state action. California Article 5—though measuring the absolute provided in California Business and Professions Code section 12211—applies a statistical "averaging" concept for the sealer to make the final determination of whether or not packages in violation should be ordered "off-sale". The federal Wholesome Meat Act of 1967 does not give state legislatures or state officers—even in the grant of concurrent enforcement jurisdiction—the right to substitute their judgment of what variances, either plus or minus come within the absolute standard of "an accurate statement of . . . in terms of weight." 21 U.S.C. § 601(n)(5)(B). Plaintiff argues the validity of 9 C.F.R. §317.2(h)(2), citing the Supreme Court sanction of a similar statute in United States v. Shreveport Grain & Elevator Company, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed 175 (1932).

But *Shreveport, supra,* does not reach the regulation under consideration here. In *Shreveport, supra,* the primary standard was given vitality because the "rules and regulations . . . deal with the *entire subject in detail* under the recital, '(i) the following tolerances and variations'. . . ." (Emphasis added.) The Court then goes on to say at page 84, 53 S.Ct. at page 44:

> ". . . Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; . . . ."

What *Shreveport, supra,* is telling us is that the *statutory* delegation is viable. It does not give viability to a redelegation that is subject to different enforcement resulting in varying degrees of reasonableness. The statute [21 U.S.C. §601(n)(5)] gives the Secretary the power of definition of "reasonable variations." The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal law. Section 317.2(h)(2) is void for its inadequacy to set any recognizable

> standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life.

The provision of the Wholesome Meat Act analogous to 21 USC §343(e) of FDCA, *supra*, is 21 USC §601(n)(5), referred to by the court in the above quotation from *Rath*.

For the reasons given in Part II of our opinion in *Rath*, we do not concur in the district court's reasoning from the *Shreveport Grain* case or in its opinion that the use of the term "reasonable" in 21 CFR 1.8b(q) fails to give persons adequate notice of the variations from accurate weight which the Secretary will countenance in the enforcement of the FDCA. We hold 21 CFR 1.8b (q) is valid and forms part of the federal labeling standard under the FDCA.

III

The differences between the FDCA and FPLA, on the one hand, and the Wholesome Meat Act of 1967, on the other, require a different analysis of the preemption issue from the analysis we employed in part III of our *Rath* opinion.

We find no unmistakable Congressional mandate that the FDCA and FPLA exclude weights and measures regulations by the States which impose standards which differ from the federal standards set by those statutes and any regulation promulgated thereunder. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

First, as explained in Part I of this opinion, weights and measures regulations are normally within the exercise of the States' police powers, and are not subject matter of a nature demanding exclusive federal regulation in order to achieve uniformity vital to national interests. Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

Second, the statutory language and the legislative history of the FDCA and FPLA fail to demonstrate the same Congressional intent to displace state regulation which we found in *Rath*. The FDCA contains *no* express preemptive language. Sections 11 and 12 of the FPLA, 15 USC §§1460 and 1461, provide as follows:

§1460. • • •

> Nothing contained in • • • [the FPLA] shall be construed to repeal, invalidate, or supersede—
>
> (a) the Federal Trade Commission Act or any statute defined therein as an antitrust Act;
>
> (b) the Federal Food, Drug, and Cosmetic Act; or
>
> (c) the Federal Hazardous Substances Labeling Act.

§1461. • • •

> It is thereby declared that *it is the express intent of Congress to supersede* any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for *the labeling of the net quantity of contents* of the package of any consumer commodity covered by this chapter which are *less stringent* than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto. [Emphasis added.]

The scope of state labeling[3] regulations not preempted, and thus permitted, by §1461 is whatever is not "less stringent" than the FPLA's requirement, which, as stated in 15 USC §1453, is that labels "separately and accurately" state the net quantity of contents. This is a wide sweep indeed, not in keeping with an express Congressional intent to preempt all state standards different from the federal standard.

The legislative history of the FPCA shows a regard in the Congress for the exercise of State police power. H.R. Rep. No. 2118, 59th Cong., 1st Sess., March 7, 1906, states with respect to the first federal Food and Drug Act, which has evolved into the FDCA:

> It is not proposed by the bill to interfere in any way with the power of the State officials over local trade, but the purpose of the bill is to give to State officials the aid of the National Government and to receive from the State officials their aid in the enforcement of the national law.

[3]We see no difference in substance between "misbranding" and "mislabeling" in this case. 15 USC §1456 defines "misbranding" to include violations of 15 USC §1453, which Jones argues pertains only to "labeling requirements." We think Jones' argument lacks substance.

We are not aware of any intervening change in the intent of Congress with respect to the impact of the FDCA on state regulation.

In a similar vein, S. Rep. No. 1186, 89th Cong., 2d Sess., May 25, 1966, on the FPLA, states:

> Section 12 [15 USC §1461] provides that regulations promulgated under the act shall supersede State law only to the extent the States impose net quantity of contents labeling requirements which differ from requirements imposed *under the terms of the act*. The bill is not intended to limit the authority of the States to establish such packaging and labeling standards as they deem necessary in response to State and local needs. [Emphasis added.]

We cannot conclude that in the FDCA and FPLA Congress has evidenced an intent to displace *all* state regulation of the net weight statements appearing on labels affixed to "food" or "consumer commodities." This does not end our inquiry, however, since Congress has made it clear that the scope of exercise of the police power left to California is confined to the enforcement of standards which are not "less stringent" than the FPLA's standard of a "separate and accurate" net weight statement, or standards as to which the FPLA makes no corresponding requirements, which are not involved in this case. And, also, as stated in *Kelly v. Washington*, 302 U.S. 1, 10 (1937):

> There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together."

We must therefore determine whether California's scheme impermissibly *conflicts* with federal law; this is an inquiry different from that where express preemption is involved. Cf. *Campbell v. Hussey*, 368 U.S. 297, 300 (1961). The "not less stringent" test

of 15 USC §1461 is *one* test for determining whether impermissible conflict exists, and it is a test specifically intended by Congress for use in this situation.

We note that, by virtue of the "savings provisions" of 15 USC §1460, compliance with the FDCA is to be considered compliance with the FPLA. By the same token, any state net weight labeling standard which is *not different* from the standard set forth in 21 USC §343(e) and 21 CFR 1.8b(q) cannot be considered "less stringent" than the FPLA standard.[4]

Our discussion in Part III of our *Rath* opinion disposes of this point on Cal. Bus. and Prof. Code §12211. The FDCA standard is virtually the Wholesome Meat Act standard verbatim. We held in *Rath* that §12211 and the regulations implementing it, 4 Cal. Admin. Code ch. 8, subch. 2, establish a different net weight labeling standard than the Wholesome Meat Act standard, because they fail to provide for the "reasonable variations" permitted by 9 CFR 317.2(h)(2). The same conclusion pertains here.

Section 12607, *supra*, presents a slightly different picture because of other provisions with which it must be construed. Cal. Bus. and Prof. Code §§12613 and 12614 provide in material part:

> §12613. • • • If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the Act of Congress entitled "Fair Packaging and Labeling Act" • • • or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement is a part of this chapter.
>
> §12614. • • • When a commodity in a container is sold and there is a discrepancy between the actual quantity of the commodities in the container and the net quantity of the contents thereof indicated on the container or between the fill of the commodity in the container and the capacity of the container there is no violation of this chapter.

[4]To hold otherwise would create the anomalous situation in which a state scheme embodying the FDCA standard, including the reasonable variations of 21 CFR 1.8b(q), would violate 15 USC §1461 since it allowed variance from the strict accuracy standard of the FPLA, 15 USC §1453.

> (a) If such discrepancy is due to unavoidable leakage, shrinkage, evaporation, waste, or causes beyond the control of the seller acting in good faith.

Sections 12607, 12613, and 12614 appear in a chapter of the Code different from that containing §12211. By virtue of the variation standard in §12614 the provision in §12607 that "the quantity of the contents so marked shall be the net amount of the commodity in the package or container" can be seen to establish a net weight labeling standard very similar to the FDCA standard, but which, by permitting variations arising from causes other than gain or loss of moisture, as specified in 21 CFR 1.8b(q), must be considered "different" from the FDCA standard, in the absence of §12613, as discussed *infra*.

We are, therefore, left with applying the "not less stringent" test. As we see it, it is not particularly relevant that California may order off sale packages of flour that comply with the FDCA and FPLA; a state scheme is "less stringent" than the federal scheme if it permits marketing of packages of flour that do not conform to the federal net weight labeling standards.

As explained in our *Rath* opinion, §12211 and the regulations in 4 Cal. Admin. Code ch. 8, subch. 2, evaluate compliance with net weight labeling standards solely by determining by statistical sampling techniques the average weight of a *lot* of packages, any of which may weigh more or less than the weight stated on its label. In a sense, by refusing to recognize any of the variations permitted by 21 CFR 1.8b(q), these provisions are stricter than the federal law. But §12211 only proscribes sale of lots of packages whose average actual weights are *less* than the label weights. The federal law requires "accurate" weight, proscribing packages that are overweight as well as underweight. We recognize that step 10 of the California procedure as described in the *Rath* opinion takes variations of individual packages from accurate weight into account in determining whether lots should be ordered off sale; but these variations are evaluated solely on a statistical basis, and may be greater than, as well as less than, the reasonable variations permitted each package by 21 CFR 1.8b(q) and may arise from circumstances not recognized by the federal regulation. We conclude that §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, do permit the sale of packages of flour that do not comply with federal law.

There is an additional reason, of equal vitality with the above, for holding §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, preempted by federal law. As the Court said in *Florida Lime & Avocado Growers, Inc. v. Paul, supra,* 373 U.S. at 142-43,

> A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce, • • • [citations omitted].

The record shows that California is a state of climatic extremes, with very dry as well as very wet areas inhabited by people who presumably consume flour. In order to comply at the retail level with the California standards, which do not recognize the variations of 21 CFR 1.8b(q), the millers would have to overpack bags intended for dry (less than 60% relative humidity) areas and underpack bags intended for wet areas in order to take into account the variations in bag weight caused by gain or loss of moisture. Such practice would, however, violate federal law, which requires accurate weight at the time of packaging, with reasonable variations caused by gain or loss of moisture being recognized only during the course of subsequent distribution. As a result of this conflict, the California scheme cannot stand.

Section 12607, standing as it does with the other provisions in its chapter of the Code with which it must be construed, presents a different situation. Section 12607 is not an average weight provision like §12211. Through the premission in §12614, *supra,* of variations of actual weight from label weight whose causes are not recognized by 21 CFR 1.8b(q), §12607 is less stringent than the FDCA, and thus the FPLA as well. For instance, weight loss caused by leakage of contents, permitted by §12607 through §12614, will result in actual weight being less than the "accurate" weight required by the FPLA on the label, without compliance with the FDCA. Section 12607 is saved from conflict with federal law, however, by §12613, *supra,* which substitutes the federal standard, as we have here explained it, for any less stringent California standard. In this situation, California must be deemed to have adopted the federal standard as its state standard, which it may do in the exercise of its police power, and §12607, read in context, does not conflict with federal law and is not invalid.

Jones' *enforcement* of §12607, however, brings into play our discussion of §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, *supra*. We agree with the district court that the enforcement of §12211 and the regulation must be enjoined. The district court found that Jones implemented §12607 through the same regulation. Although §12607 alone is a valid exercise of California's police power, its enforcement through the regulation is not, for the reasons given *supra*.

We hold that the district court correctly enjoined the enforcement of, and declared invalid, §12211 of the Business and Professions Code and 4 Cal. Admin. Code ch. 8, subch. 2. The district court should not have declared §12607 of the Business and Professions Code invalid, but correctly enjoined the enforcement of §12607 through the procedures described in 4 Cal. Admin. Code ch. 8, subch. 2.

We have attempted to make it clear that by this decision we do not deprive California of its unquestioned right to exercise its police power in the regulation of weights and measures so as to prevent the sale to consumer of packaged flour and other foods which do not weight what their labels say they do. We find merely that certain statutes and regulations enacted by California in exercise of its police power conflict with federal law in such a manner that they are superseded by federal law. California is free to enact other statutes and regulations that do not suffer from this infirmity. Where proper state standards exist, Jones and other county directors of weights and measures may employ state procedures, including off-sale orders, to enforce the state law.[5]

IV

After the entry of the district court order, California promulgated a new regulation, 4 Cal. Admin. Code, ch. 8, subch. 2.1, to

> • • • apply only during proceedings in the case of General Mills, Inc., et al. vs. Joseph W. Jones, etc., No. 73-715-R, United States District Court, Central District of California.

[5]The millers have not contended that the FDCA, FPLA, and state standards enforceable thereunder cannot be enforced at the retail level. Cf. Part IV of our *Rath* opinion. The off-sale order scheme used in California can, as we held in Part I of this opinion, *supra*, be used constitutionally to enforce a valid California weights and measures regulation program.

> This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of flour and flour products. Flour products includes cake mixes, pancake mixes and similar products in which flour is the principal ingredient, but does not include processed products such as bread and pastry using flour or flour products as ingredients.

The district court, though asked to do so, refused to modify its order to enjoin the enforcement of subch. 2.1 as well.

This new regulation purports to apply "federal standards of accuracy to the products involved, which standards are coincident with California standards of accuracy." We find it falls short of its announced goal.

Only one section of the new regulation, §2970.2(a) need detain us on this point. It provides:

> The sealer of weights and measures shall order off sale all packages which are found to be short weight under either procedure stated in Section 2970.1. He shall record on a form specified by the director the shortage determined for each package marked off sale.

We note this section follows the federal standard in considering the weights of individual packages and not just the average weight of a lot. We note also that no reasonable variations from stated weight, as in 21 CFR 1.8b(q), are permitted. However, this regulation permits the sale of overweight packages, and thus is less stringent than the "accurate" weight standard of federal law. Where no variations as stringent or more stringent than those allowed under the FDCA are provided for, California may not restrict the sale only of underweight packages, while letting overweight packages, which the FPLA deems improperly labeled, remain on sale. Furthermore, simultaneous compliance with federal law and subch. 2.1 is made physically impossible by California's failure to recognize reasonable variations from label weight as permitted by 21 CFR 1.8b(q). We hold that California may not enforce its weights and measures laws through the procedures of 4 Cal. Admin. Code ch. 8, subch. 2.1.[6]

[6]This holding and our holding in Part III, *supra*, render it unnecessary to decide the millers' claims that 4 Cal. Admin. Code ch. 8, subchs. 2 and 2.1 were not promulgated in accordance with California law.

V

CONCLUSION

In recapitulation, we hold:

(1) that the single judge below properly refused to convene a three-judge district court to hear and decide this case, since the constitutional issues raised in this case are not substantial;

(2) that the enforcement of valid state weights and measures laws through the use of off-sale orders prior to a hearing or opportunity for judicial review does not unreasonably burden interstate commerce or violate the due process clause of the Fourteenth Amendment to the Constitution of the United States;

(3) that the district court erred in invalidating 21 CFR 1.8b(q);

(4) that Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, impermissibly conflict with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 CFR 1.8b(q), and that Jones was properly enjoined from enforcing those sections;

(5) that the district court erred in invalidating Cal. Bus. and Prof. Code §12607 but correctly enjoined its enforcement through 4 Cal. Admin. Code ch. 8, subch. 2; and

(6) that 4 Cal. Admin. Code ch. 8, subch. 2.1, impermissibly conflicts with the standards imposed by the Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and 21 CFR 1.8b(q), and may not be used as the basis for procedures enforcing California law.

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and the case is remanded for entry of an amended order in conformance with this opinion.

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation, *Plaintiffs and Counterdefendants,* vs. JOSEPH W. JONES as Director of the County of Riverside Department of Weights and Measures, *Defendant and Counterclaimant.*	CIVIL ACTION No. 73-715-R MEMORANDUM OPINION AND ORDER

Plaintiffs and defendants by cross motion for summary judgment invite the Court to revisit its decision in *Rath Packing Company v. Becker, et al.*, 357 F. Supp. 529 [C.D. Cal. 1973], advocating reversal or modification of views expressed therein.

Factually, this case is indistinguishable from *Rath, supra*, except that wheat flour is the commodity involved instead of meat, thereby substituting the application of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. § 301 et seq. Et. Seq. in place of the federal Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq.

Defendant, JOSEPH W. JONES, the Director of County of Riverside, Department of Weights and Measures, has, in the performance of his duties, through inspectors employed in his department, ordered off-sale wheat flour products of each of the plaintiffs pursuant to the provisions of California Business and Professions Code, sections 12211 and 12607, as implemented by Title 4, California Administrative Code, Chapter 8, subchapter 2.

Defendant continues to apply the state requirements held invalid in *Rath, supra*. The suggestion in *Rath, supra*, that state officers "have available to them a federal statutory scheme which, when properly executed by state . . . officers, secures to the American homemaker the assurance that expected wholesomeness and value

is received for each consumer dollar spent," at 535, is misread by defendant when he insists on using *state standards as the measure* for determining misbranding or mislabeling. Federal standards preempt state law. Off-sale orders and other state procedures are available to state officers, but only to assure compliance with those requirements of federal law provided in the Federal Food, Drug, and Cosmetic Act and federal Fair Packaging and Labeling Act as they may be applied to plaintiff's products. The enactment of these same *federal* standards as state law is another alternative available for the protection of California consumers.

Plaintiffs' position here is no different than the plaintiff in *Rath, supra.* Here 21 C.F.R., Section 1.8(b)(q) suffers from the same infirmity as did 9 C.F.R. 317.2(h)(2) in the *Rath, supra,* case. The Secretary has failed to express tolerances which may be the "reasonable variations" of the regulation. Without such an expression—from the Secretary—each enforcement officer is left to his own personal standard of what is reasonable. So long as the Secretary does not act to correct this inadequacy in the regulations, enforcement officers are left with the absolute standard of the statute that each package must contain as part of its label "an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count".

The state standard applied by defendant does not meet the measure.

No constitutional question is presented by plaintiffs which require [sic] resolution by a three-judge court.

Accordingly,

IT IS ORDERED:

1. That defendant, together with his deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with him are jointly and severally restrained and enjoined from applying the provisions of California Business and Professions Code, sections 12211 and 12607, and/or the provisions of Title 4, California Administrative Code, Chapter 8, subchapter 2, to the products of plaintiffs, which have been subjected to the provisions of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., and/or the federal Fair Packaging and Labeling Act and any valid regulation promulgated pursuant thereto.

2. The Court reserved the continuing jurisdiction to make any modification to the injunction contained herein upon proper application by any party, as the ends of justice may require.
3. The motion for a three-judge court is denied.
4. The motion of defendant for summary judgment is denied.
5. Except as herein expressly provided, the motion for summary judgment of plaintiffs is denied.

Dated: September 17, 1973.

/s/ Manuel L. Real
United States District Judge

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APPENDIX.

The Rath Packing Company, a corporation, Plaintiff and Counter-Defendant, v. M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, Defendant, C. B. Christensen as Director of Agriculture of the State of California, Intervenor.

The Rath Packing Company, a corporation, Plaintiff, v. The People of the State of California, Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civ. A. Nos. 72-607-R, 72-608-R. United States District Court, C. D. California. April 3, 1973.

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., Dean C. Dunlavey, Los Angeles, Cal., for plaintiff.

John Maharg, County Counsel, Arnold K. Graham, Deputy County Counsel, Los Angeles, Cal., for M. H. Becker.

Ray T. Sullivan, Jr., County Counsel, Loyal E. Keir, Deputy County Counsel, Riverside, Cal., for Joseph W. Jones.

Evelle J. Younger, Atty. Gen. of Cal., Carl Boronkay, Asst. Atty. Gen., Herschel T. Elkins and Allan J. Goodman, Deputy Attys. Gen., for Intervenor C. B. Christensen.

MEMORANDUM OPINION AND ORDER

REAL, District Judge.

These matters have been consolidated for decision after trial of Case No. 72-607-R, and hearing of cross-motions for summary judgment in case No. 72-608-R. The facts of both cases have much commonality with little or no dispute of the facts necessary to disposition of both cases.

Plaintiff, The Rath Packing Company, (hereinafter Rath), is a meat processor subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq.

Defendants M. H. Becker (hereafter Becker) and Joseph W. Jones (hereafter Jones) are Directors of County Department of Weights and Measures of Los Angeles and Riverside Counties respectively. C. B. Christensen, as Director of Agriculture of the State of California has heretofore been granted leave to intervene in the Becker action and has participated in presenting the defense in that action.

The controversy arises out of the actions of Becker and Jones through their respective deputies of ordering off-sale meat products delivered by Rath to retail stores found to be short of the weight stated on the label. Determination of short-weight has been made in each case by the application of the provision of Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5.

Fundamental to resolution of the validity of Becker and Jones' actions is a determination of the reach of the federal Wholesome Meat Act of 1967, 21 U.S.C.

§ 601 et seq., *i.e.*, preemption by the federal government of the regulation of meat and meat products.

The federal Wholesome Meat Act of 1967 was enacted by Congress with the finding that:

> ". . . Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers." 21 U.S.C. § 602.

A reading of the statutory scheme together with the legislative history[1] demonstrates clearly, in the context of our concern here, that Congress intended to broaden federal regulation of meat and meat food products to cope with adulteration, unwholesomeness and misbranding for the welfare of consumers.

The essence of the controversy here is found in Congressional enactment of Title 21, United States Code, Section 601(n) which provides:

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product under one or more of the following circumstances:
>
> (5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count: Provided, That under Clause (B) of this subparagraph (5), reasonable variations may be permitted, . . . by regulations prescribed by the Secretary."

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[1]U.S. Code Congressional and Administrative News, 90th Congress, First Session, 1967, pages 2188-2213.

Rath claims that it meets the criteria of 21 U.S.C. § 601(n)(5) when its products are considered under the application of regulations published by the Secretary of Agriculture in 9 C.F.R. § 316.1 et seq. and 21 U.S.C. § 607(b).

21 U.S.C. § 607(b) provides in its pertinent part:

> "(b) All . . . meat and meat food products inspected at any establishment under the authority of this subchapter . . . shall at the time they leave the establishment bear, in distinctly legible form, directly thereon or on their containers . . . the information required under paragraph (n) of section 601 of this title."

Rath argues that section 607(b) limits the inquiry of accurate weight to the time meat or meat food products leave a processor's plant under federal inspection. Rath here argues for too much. To complete the regulatory scheme and maintain continuing enforcement, Congress gave federal meat inspectors the power of seizure of adulterated or misbranded meat or meat food products at any level of distribution. 21 U.S.C. § 673 makes clear that the provisions of section 601(n)(1-12) can be applied to packages of meat or meat food products at the ultimate end of a meat processor's distribution system—the retail store.

The defendants so argue—but they fall short in the recognition of what it is they are permitted to do by the federal Wholesome Meat Act of 1967. The provisions of 21 U.S.C. § 679 limit the state in clear and unequivocal language. Therein, the states are admonished that ". . . [M]arking, labeling, packaging or ingredient requirements in addition to, or

different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter. . . ." Rath is clearly within these requirements.

Defendants defend their acts and rely—as the source of their authority and practice—upon state statutes. We now proceed to analyze that state statutory scheme to determine whether it meets the limitations of 21 U.S.C. § 678 when applied to the products of Rath.

Defendants cite as their primary source California Business and Professions Code section 12211 which provides in its pertinent part:

> "§ 12211. Weighing or measuring commodities sold or being delivered; rules and regulations; off sale order; evidence. Each sealer shall . . . weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented. . . .
>
> The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers . . . in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section.
>
> * * *
>
> Whenever a lot or package of any commodity is found to contain . . . a less amount than that represented, the sealer shall in writing order same off sale. . . ."

Following the direction of the California legislature, the Director of Agriculture of the State of California has published in Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5 (hereafter Article 5) a comprehensive procedure for testing commodities to determine their compliance with California Business and Professions Code section 12211. In a detailed step by step process, the sealer is led to the determination of whether or not the commodities in question "contain a lesser amount than represented". The procedure is a statistical determination based upon normal and proven statistical standards. As such, the result can be no better than the objective, and the stated objective of Article 5 is to determine by sampling techniques the qualification of a lot of commodities to the requirements of section 12211, *i.e.*, that the quantity represented on the label is what the package contains. These techniques are questioned by Rath as contravening the prohibition against adding to or differing from the labeling requirements of the federal Wholesome Meat Act of 1967. Defendants argue validity, urging that preemption by the federal government is limited by 21 U.S.C. § 678 when it provides:

> ". . . but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing distribution . . . of any such articles which are adulterated or misbranded and are outside of such an establishment. . . ."

It is clear in the provisions for concurrent jurisdiction outside an inspected plant that such actions as are

undertaken by states in the regulation of meat and meat food products must be *consistent* with the requirements of the federal Wholesome Meat Act of 1967. That Act has spoken upon the subject of misbranding—and more particularly when misbranding is related to comparison of the label with contents as provided in 21 U.S.C. § 601(n)(5) in this language:

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . .
>
> * * *
>
> (5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of quantity . . . in terms of weight . . .: Provided, That under clause (B) of this subparagraph (5) reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

To implement subsection (5), the United States Secretary of Agriculture published rules and regulations in Title 9, Code of Federal Regulations. In section 317.2(h)(2) the Secretary provides:

> "(2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

California Article 5 just does not meet this federal standard. Nowhere in the measuring processes set forth

therein in detail is any consideration given to the possible "loss . . . of moisture during the course of good distribution practice." The measure of Article 5 is "absolute" as determined by accepted statistical methods and, as such, erroneously encroaches upon the standards provided by the federal Wholesome Meat Act of 1967.

Defendants argue, however, that section 317.2(h)(2) is void for vagueness; that, therefore, we are left with the absolute standard, "an accurate statement of . . . weight". Though valid, this argument does not end the inquiry in favor of state action. California Article 5—though measuring the absolute provided in California Business and Professions Code section 12211—applies a statistical "averaging" concept for the sealer to make the final determination of whether or not packages in violation should be ordered "off-sale". The federal Wholesome Meat Act of 1967 does not give state legislatures or state officers—even in the grant of concurrent enforcement jurisdiction—the right to substitute their judgment of what variances, either plus or minus come within the absolute standard of "an accurate statement of . . . in terms of weight." 21 U.S.C. § 601(n)(5)(B). Plaintiff argues the validity of 9 C.F.R. § 317.2(h)(2), citing the Supreme Court sanction of a similar statute in United States v. Shreveport Grain & Elevator Company, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932).

But *Shreveport, supra,* does not reach the regulation under consideration here. In *Shreveport, supra,* the primary standard was given vitality because the "rules and regulations . . . deal with the *entire subject in detail* under the recital, '(i) the following tolerances

and variations'. . . ." (Emphasis added.) The Court then goes on to say at page 84, 53 S.Ct. at page 44:

> ". . . Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice;. . . ."

What *Shreveport, supra,* is telling us is that the *statutory* delegation is viable. It does not give viability to a redelegation that is subject to different enforcement resulting in varying degrees of reasonableness. The statute [21 U.S.C. § 601(n)(5)] gives the Secretary the power of definition of "reasonable variations". The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal law.[2] Section 317.2(h)(2) is void for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life.[3]

Conceding the invalidity of section 317.2(h)(2) to defendants, they now argue that the state is free to set its own standards of "reasonable variations" citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248, rehearing denied, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082. The error of such dependence on *Florida Lime,*

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[2]5 U.S.C. §§ 551-559.

[3]Under the regulation as it is written one meat inspector may conclude that x% loss of moisture can be expected. Given the same factual context, another meat inspector may come to the conclusion that y% loss of moisture is reasonable. Delegation of "administrator's function" has never included giving each enforcement officer the "keys to the jailhouse".

supra, is evidenced by the recognition by the Supreme Court, beginning at page 142, 83 S.Ct. 1210, that Congress had not foreclosed activity by the states where it can be reconciled with federal regulation. Here the defendants attempt to justify the California statutory scheme by a misunderstanding that labeling, qua labeling, is what the federal Wholesome Meat Act of 1967 is all about and that California's statute is aimed at misbranding. This conclusion is erroneous for two reasons:

1. Congress has defined "misbranding".
2. "Misbranding" has no meaning except insofar as it describes a departure from the labeling description of a commodity within a package.[4]

The Court is aware of the admonition in *Florida Lime, supra,* in measuring preemption when the Supreme Court says at page 142, 83 S.Ct. at page 1217:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained."

The Congress here has left no doubt. It is *the* provisions of *the* federal Wholesome Meat Act of 1967 that are applicable to mislabeling or misbranding that must be applied. Neither state legislatures nor state officers can add or subtract from those definitions.

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[4]Each of the twelve categories of misbranding described in 21 U.S.C. § 601(n) refers to, in some way, a label. Common sense tells us that mislabeling and misbranding are synonymous terms.

If administrative definition of "reasonable variances" is desirable, it is the United States Secretary of Agriculture who must speak. When he fails to speak or misspeaks his authority, the state cannot substitute its voice. Defendants here do not, in any sense of the word, pretend to be applying federal statutory standards. The enforcement of California Business and Professions Code section 12211 and its implementation in California Administrative Code Article 5 exceeds the concurrent enforcement rights of the state and its officers.

This conclusion should not in any way be taken to mean that state officers (sealers) cannot continue their stated mission to protect consumers of their respective jurisdictions. They have available to them a federal statutory scheme which, when properly executed by state or federal officers, secures to the American homemaker the assurance that expected wholesomeness and value is received for each consumer dollar spent. That the evidence here shows the United States Department of Agriculture may have abdicated some of its protective duty, does not justify the application of a *different* labeling requirement by the state of California and its officers.

The claimed exemptions by Rath of its meat and meat food products do not—if beyond the preemption standards recognized herein—need resolution to fully determine the controversy between the parties.

In case No. 72-607-R judgment shall be entered for plaintiff.

In case No. 72-608-R the motion for summary judgment of defendant is denied. The motion for summary judgment of plaintiff is granted.

Accordingly,

It is ordered:

1. That defendants and intervenor in case No. 72-607-R, and defendants in case No. 72-608-R, together with their respective deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with them, and each of them, are restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211 and/or the provisions of Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5, to articles prepared and marketed by plaintiff under United States Department of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act of 1967 [21 U.S.C. § 601 et seq.].

2. The Court reserves the continuing jurisdiction to make any modification to this injunction upon proper application by any party, as the ends of justice may require.

California Business and Professions Code Section 12211 [Stats. 1939, C. 43, p. 450, as Amended Stats. 1949, C. 1384, p. 2407; Stats. 1957, c. 1658, p. 3038, Stats. 1963, c. 353].

Weighing or measuring commodities sold or being delivered; rules and regulations; off sale order; evidence

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers in connection with the weighing or measuring of amounts of commodities in individual packages or containers or lots of such packages or containers, including the procedures for sampling any such lot, and in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section. . . .

Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4.5 (commencing with Section 11371), of Part 1 of Division 3 of Title 2 of the Government Code; provided, that the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package, and provided further, that said rules

or regulations applicable to food, as defined in Section 26450 of the Health and Safety Code, insofar as possible, shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act.[2]

Any lot or package of any such commodity which conforms to the provisions of this section shall be deemed to be in conformity with the provisions of this division relating to stated net weights or measures.

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

Title 4 California Administrative Code, Vol. 4, p. 271.

Article 5. Sampling and Testing Procedure for Estimating Container Fill of Packaged Commodities

Definitions

2930. *Application of Definitions.* The definitions in this article apply to this article only and do not affect the provisions of any other article, chapter or subchapter.

NOTE: Authority cited for new Article 5 (§§2930 through 2933.3.20): Section 12027, Business and Professions Code. Reference: Section 12211, Business and Professions Code.

History: 1. *New article* (§§2930 through 2933.3.20) filed 12-30-60; effective thirtieth day thereafter (Register 61, No. 1).

2931. *Container.* "Container" means any receptacle or carton, whether lidded or unlidded, into which a commodity is packed or placed, or any wrappings with or into which any commodity is wrapped or put for sale.

2931.1. *Package.* "Package" means any consumer size "container" and its contents.

2931.2. *Tare Material.* "Tare Material" shall be synonymous with "Container," and "Tare" shall be construed to be the weight of such tare material.

2931.3. *Lot; Sub-lot.* "Lot" means the total number of packages of a single item of merchandise in a single size at one location and may contain two or more "sub-lots."

"One location" shall be construed to mean "one display" or "one grouping," and does not, for example, mean all items of the same brand and size stored or kept for sale in one establishment.

(a) "Sub-lot" refers to those packages of merchandise within either a "Standard-Pack" lot or "Random-Pack" lot which can be readily identified by a similar or uniform "Lot-Symbol" or grouping.

2931.4 *Lot-Symbol.* "Lot-Symbol" means the word, letter or numeral (or combination of these), used by the packer or manufacturer to identify packages which were packed or shipped at a given time.

2931.5. *Classes of Prepackaged Commodities.* (1) "Standard-Pack" means consumer size packages of a uniform weight, measure or count, of the same brand or identification.

(b) "Random-Pack" means consumer size packages of the same brand or identification but of varying weight, volume, or count.

2931.6. *Sample.* "Sample" designates the group of packages or containers used for testing purposes.

(a) "Package Sample Size" shall be as noted in "Procedure," 2933.3, Table I, Column "B" and shall be based on Column "A" "Lot Size."

(b) "Sub-groups" shall be formed by recording the individual observations in the order in which they are weighed, measured, or counted.

(c) "Tare Sample Size" shall be as noted in "Procedure," 2933.3, Table I, Column "D" and shall be based on Column "B" "Package Sample Size."

(Note: When selecting a sample representing a "lot" or "sub-lot", the packages shall be selected at random if practicable. Packages shall be selected without regard to appearance. If practicable all samples shall be selected before weighing, measuring or testing is done. This provides for testing the "lot" or "sub-lot" in an "as found" condition.)

2931.7. *Retail Level.* "Retail Level" shall be construed to designate any place of business, or manner of selling any product, in which said product is, or may be, sold, offered or exposed for sale directly to the consumer or user.

(Note: When selecting a "sample" to be tested at the "retail level" said sample shall include

only those packages selected from a "lot" or "sub-lot" at a single point-of-sale location. This shall not preclude the taking of other "samples" from storage facilities, or other locations, within the retail outlet. However, any action to be taken by the inspector with respect to any "lot" or "sub-lot" shall be based on the "sample" of the specific "lot" or "sub-lot.")

2931.8. *Wholesale Level.* "Wholesale Level" shall be construed to include the packing, manufacturing, warehouse, storage, jobber and distribution levels.

(Note: In most cases at the above named levels, products will be found in case lots. The "sample" shall be based on the number of "packages" within the cases of the "lot" or "sub-lot.")

2931.9. *Unsuitable-for-sale.* "Unsuitable-for-sale" packages are packages that have been opened for testing purposes and cannot, in their opened state, be classed as saleable merchandise.

However, packages opened in the place of business where originally packaged are not to be construed as "unsuitable-for-sale" if, by following good sanitary procedures and adequately protecting the public health, the commodity within these packages may be reprocessed or repackaged. This shall be done at the expense of said packer.

2931.10. *Error.* "Error" means the amount the observed net contents of a package varies from the declared labeled contents.

Equipment and Use

2932. *Testing Equipment and Use.* The testing equipment used by weights and measures officials shall

be of such design, sensitivity, and construction so as to render accurate weight indications throughout its designated capacity. Said testing equipment should be fitted with locking devices to minimize wear to the working component while in transit, and should also be fitted with a handle for carrying and protective cover or box.

All testing equipment owned by a weights and measures jurisdiction shall be restricted to official use and completely controlled by said weights and measures jurisdiction.

Scales used by state or local officials for the package-checking procedure should be of such design and construction as to afford weight graduations appropriate to the quantity declarations on the packages to be checked.

2932.1. *Location of Package-checking Operations.* After the announcement of his presence, the official is to select a suitable position for his package-checking operations. The principal requirement of the site is its convenience—both to the inspector and to the place of business.

2932.2. *Placement, etc. of Testing Equipment.* The inspector shall see that the testing equipment used is placed upon a firm support immediately prior to its official use, is suitably leveled, and is tested for sensitiveness and accuracy at least through the weight range of the packages to be tested.

2932.2.1. *Use of Store Scale for Tests.* If a store scale is selected for use in the tests it shall be accurate and capable of being properly utilized for such tests. Once the scale has been selected by the inspector,

it shall not be released, except at his discretion, until the inspector's use of it has been completed.

History: 1. Amendment filed 9-23-71; effective thirtieth day thereafter (Register 71, No. 39).

2932.3. *Recordation of Errors.* Package "errors" (the amount of deviation from the stated net contents) shall be recorded only within the sensitivity of the scale at the applied load.

(Example: A scale graduated in 1/8 oz. graduations is found to be accurate and sensitive to 1/16 oz. Errors may be recorded to 1/16 oz. or any amount greater than 1/16 oz. A scale graduated in 1/8 oz. graduations is found to be accurate and sensitive to 1/8 oz. In no case shall errors be recorded to less than 1/8 oz. for that scale, but may be recorded in amounts greater than 1/8 oz.)

Procedure: Commodities Sold by Weight or Count in "Standard-Pack" or "Random-Pack" Packages

2933. *Intent of Outline of Procedures.* It is the intent of the following step-by-step procedures to outline a uniform, feasible, and equitable method for determining acceptable or "off-sale" lots of packaged commodities based upon the average concept, and for determining which packages have unreasonable errors.

2933.1. *Lots.* The procedures for package testing as set forth herein shall be used only for single "lots," or "sub-lots." The results obtained from full samples of different "lots" or "sub-lots" shall not be numerically

averaged together or acted upon jointly. For purposes of passing or marking "off-sale," each lot or sub-lot tested shall be acted upon individually.

2933.2. *Off-Sale Order.* Pursuant to Division 5, Chapter 1, Section 12025.5 of the Business and Professions Code of the State of California, packages marked "off-sale" shall be suitably marked or identified with a tag or device. Said device or tag to be designed and furnished by the bureau. Such packages shall be subject to the provisions of Section 12025.5.

2933.3. *Payment for Packages.* Immediately after completion of tests upon a "lot" to be passed as correct the weights and measures official in charge of the test shall offer to pay for packages which he has, or caused to be, rendered "unsuitable for sale." Any such packages paid for with county funds shall be subject to such disposal as ordered by the governing board of supervisors. If, however, the "unsuitable for sale" packages are part of a lot marked off-sale then these packages are to be considered as part of the lot and the weights and measures officials need not pay for said packages. Packages opened in the place of business where originally packaged are not to be construed as "unsuitable for sale" if, by following good sanitary procedures and adequately protecting the public health, the commodity within these packages may be reprocessed or repackaged. This shall be done at the expense of the said packer. Pursuant to Division 5, Chapter 2, Article 2, Section 12211 of the Business and Professions Code, "the sealer may seize as evidence any package or container which is found to contain a lesser amount than represented."

Table I shall be used for Step 1 through Step 5 following:

Table I

"A" Lot Size	"B" Package Sample Size	"C" Sub-Group Size	"D" Tare Sample Size
2	2	ALL	2
3	3	ALL	2
4	4	ALL	2
5	5	ALL	2
6	6	ALL	2
7	7	ALL	2
8	8	ALL	2
9	9	ALL	2
10	10	ALL	2
11-150	10	5	2
151-300	15	5	2
301-500	25	5	3
501-800	30	5	4
801-1300	40	5	5
1301-3200	50	5	6
3201-8000	60	5	7
8001-22,000	120	5	12
Over 22,000	240	5	23

2933.3.1. (Step 1.) *Number to Be Tested.* Determine the number of consumer size packages in the "lot" to be tested.

2933.3.2. (Step 2.) *Package Sample Size.* Determine the "PACKAGE SAMPLE SIZE" from Table I, Section 2933.3, column "B" "PACKAGE SAMPLE SIZE" corresponding to column "A" "LOT SIZE."

2933.3.3. (Step 3.) *Tare Sample Size.* Determine the "TARE SAMPLE SIZE" from Table I, Section 2933.3, column "D" "TARE SAMPLE SIZE" corresponding to column "B" "PACKAGE SAMPLE SIZE."

(Example: The "lot" being sampled consists of 32 cases of 24 consumer size packages in each case. "LOT SIZE" (column "A")=768 consumer size packages ($32 \times 24 = 768$). A lot size of 768 packages falls in the range of 501-800

in column "A," and by reading to the right in column "B" a "PACKAGE SAMPLE SIZE" of 30 is determined. By reading to the right of 30 in column "B," a "TARE SAMPLE SIZE" of 4 is determined from column "D." These four packages are to be selected at random from the packages selected to represent the "PACKAGE SAMPLE SIZE.")

2933.3.4. (Step 4.) *Recording of Tare Sample.* Carefully weigh and record the gross weight of each package of the "Tare Sample" and identify each with a letter or numeral to be written on the package. (These containers should then be retained for use in Step 5.) Exercising care that none of the contents is spilled or lost, determine and record the net weight of the contents of each package. The net weight of the contents shall not include any free water or ice or ice glaze. When products are packaged in non-edible brine or other non-edible preserving fluids, the weight or measure of the non-edible brine or other non-edible fluid shall not be included in the weight or measure of the edible or other commodity indicated on the container.

2933.3.5. (Step 5.) *Tare Weight Determination.* Determine the average tare weight of the containers in the "Tare Sample" by dividing the total weight of the tare material by the number of containers. Individual container tare weights are classified as "Wet Tare" and "Dry Tare." When a single lot has some containers classed as "Wet Tares" and others as "Dry Tares," the weights of a representative number of "Wet Tares" and "Dry Tares" may be combined and averaged together.

(a) *"Wet Tare"* shall be determined by weighing the used, empty container from which all the usable net contents have been removed.

(b) *"Dry Tare"* shall be determined by weighing the empty and dry containers or by weighing unused containers of the same make, design, and type used at the time of packing. A "Dry Tare" is to be used only when none of the containers in the lot being sampled has retained a substance foreign to the container.

History: 1. Amendment of subsection (b) filed 9-23-71; effective thirtieth day thereafter (Register 71, No. 39).

2933.3.6. (Step 6.) *Recording of Errors.* Using the average tare weight determined in Step 5, each package in the PACKAGE SAMPLE shall be weighed and the errors recorded and, except for one hundred per cent sampling, shall be recorded in sub-groups of five (5). Regardless of the units in which the errors are recorded (tenths, sixteenths, eighths, quarters, or the like), these recordings are shown as whole numbers. The recording of results, either by one hundred per cent sampling or sub-groups, shall be as follows:

(a) The "zero errors" (recorded as 0) and the "plus errors" (recorded as whole numbers) are to be recorded in one column.

(b) The "minus errors" (recorded as whole numbers) are to be recorded in a second column.

2933.3.7. (Step 7.) *Established Tolerance.* If a tolerance has been established by the director for the commodity being tested, then any package the error of which exceeds, either plus or minus, the established tolerance shall be subject to appropriate action.

2933.3.8. (Step 8.) *Preliminary Total Error.* Determine the preliminary total error of the PACKAGE

SAMPLE. The preliminary total error, for those lots on which conclusions have not been reached under the foregoing procedure, shall be determined as illustrated by the following example:

(Note: In Example I below, the lot consisted of 200 packages giving "PACKAGE SAMPLE SIZE" of 15 and a "SUB-GROUP SIZE", from Table I, of 5, therefore three SUB-GROUPS shall be used in the computation.)

(a) As in the Example I below, add the plus (+) errors, on the one hand, and the minus (—) errors, on the other hand.

Example I

	Errors		
	—	+ & 0	Range
Sub-group No. 1	1 3 1 1 3	— — — — —	— — — — 3
Sub-group No. 2	2 8 —	1 2 1	— — 10
Sub-group No. 3	2 — — —	0 0 0 0	— — — 2
Totals	—21	+4	14

Preliminary total error.....(−21) + (4) = −17

Preliminary average error.....(−17 ÷ 15) = − 1.13

Preliminary average range.....(14 ÷ 3) = 4.66

(b) Calculate the preliminary total error by algebraically adding the plus and minus errors. This is accomplished by arithmetically subtracting the smaller from the larger value and giving the remainder the sign of the larger value. (For example a plus four, (+4) added to a minus two (—2), equals a plus two (+2); or a plus four (+4), added to a minus nine (—9), equals a minus five (—5).)

2933.3.9. (Step 9.) *Range.* Calculate the range of each subgroup. The range is the total difference between the largest and smallest observation. (For example, the range between a minus 8 (—8) and a plus 2 (+2) is 10, or the range between a plus 2 (+2) and a plus 10 (+10) is 8.) Total the ranges of all the sub-groups in the sample. Divide this sum by the number of sub-groups in the sample. Record this result as the preliminary average range. (In Example I, Section 2933.3.8, we have 14 ÷ 3 = 4.66.)

2933.3.10. (Step 10.) *Unreasonable Errors.* Determine the unreasonable error of individual packages by one of the following:

(a) If the preliminary average error is plus or zero, an individual unreasonable plus error is that package error which exceeds the sum of the preliminary average error and the numerical value shown in Table II; and an individual unreasonable minus error is one which exceeds the numerical value shown in Table II.

(b) If the preliminary average error is minus, an individual unreasonable minus error is that package error which exceeds the numerical value shown in Table II; and an individual unreasonable plus error

is that package error which exceeds the value of the remainder of the preliminary average error subtracted from the numerical value shown in Table II.

(Note: In Example I, using the range of 4.66 and the sub-group size of 5, the individual unreasonable minus error from Table II is any minus package error greater than 3.90; and the individual unreasonable plus error is any plus package error greater than 1.13 subtracted from 3.90 or 2.77.)

(c) Circle and exclude all individual unreasonable errors from further computations. Additional replacement packages shall be selected until those discarded as individual unreasonable errors have been replaced by ones suitable for final computation. Only packages having errors equal to or less than the unreasonable individual errors as originally determined in (a) and (b) of this section shall be suitable for final computations.

(d) If at any time during this part of the procedure the total number of packages having unreasonable minus errors, which are also unreasonable under the provisions of Division 5, Chapter 6, Section 12612 of the Business and Professions Code, and this number exceeds the number shown in Table I, Column D, for the corresponding sample size, then appropriate action shall be taken according to the provisions of Division 5, Chapter 2, Article 2, Section 12211 of the Business and Professions Code without further sampling.

If at any time during this part of the procedure the total number of packages having unreasonable plus errors exceeds the number shown in Table I, Column D, for the corresponding sample size then appropriate action shall be taken by calling this condition to the attention of the store operator or packer, or distributor.

Table II—Maximum Permissible Individual Error

Range*	SUB-GROUP SIZE								
	2	3	4	5	6	7	8	9	10
0.01- 0.19	.17	.12	.10	.08	.08	.07	.07	.07	.06
0.20- 0.39	.53	.35	.29	.25	.23	.22	.21	.20	.19
0.40- 0.59	.87	.58	.43	.42	.39	.36	.34	.33	.32
0.60- 0.79	1.22	.81	.67	.59	.54	.51	.48	.46	.45
0.80- 0.99	1.56	1.04	.85	.76	.70	.65	.62	.59	.57
1.00- 1.24	1.95	1.30	1.07	.95	.87	.82	.77	.74	.72
1.25- 1.49	2.39	1.59	1.31	1.16	1.06	1.00	.95	.91	.88
1.50- 1.74	2.83	1.88	1.55	1.37	1.26	1.18	1.12	1.07	1.03
1.75- 1.99	3.26	2.17	1.78	1.58	1.45	1.36	1.29	1.24	1.19
2.00- 2.24	3.69	2.46	2.02	1.79	1.64	1.54	1.46	1.40	1.35
2.25- 2.49	4.13	2.75	2.26	2.00	1.84	1.72	1.63	1.57	1.51
2.50- 2.74	4.56	3.04	2.50	2.21	2.03	1.90	1.81	1.73	1.67
2.75- 2.99	4.99	3.33	2.74	2.42	2.22	2.08	1.98	1.90	1.83
3.00- 3.24	5.43	3.62	2.97	2.63	2.42	2.27	2.15	2.06	1.99
3.25- 3.49	5.86	3.91	3.21	2.84	2.61	2.45	2.32	2.23	2.15
3.50- 3.74	6.30	4.20	3.45	3.05	2.80	2.63	2.50	2.39	2.31
3.75- 3.99	6.73	4.49	3.69	3.27	3.00	2.81	2.67	2.56	2.47
4.00- 4.24	7.16	4.78	3.93	3.48	3.19	2.99	2.84	2.72	2.63
4.25- 4.49	7.60	5.07	4.16	3.69	3.38	3.17	3.01	2.89	2.79
4.50- 4.74	8.03	5.36	4.40	3.90	3.58	3.35	3.18	3.05	2.95
4.75- 4.99	8.47	5.65	4.64	4.11	3.77	3.53	3.36	3.22	3.10
5.00- 5.24	8.90	5.93	4.88	4.32	3.96	3.71	3.53	3.38	3.26
5.25- 5.49	9.34	6.22	5.12	4.53	4.16	3.90	3.70	3.55	3.42
5.50- 5.74	9.77	6.51	5.35	4.74	4.35	4.08	3.87	3.71	3.58
5.75- 5.99	10.20	6.80	5.59	4.95	4.54	4.26	4.04	3.88	3.74
6.00- 6.49	10.88	7.24	5.95	5.27	4.83	4.53	4.30	4.12	3.98
6.50- 6.99	11.73	7.82	6.43	5.69	5.22	4.89	4.65	4.45	4.30
7.00- 7.49	12.59	8.40	6.90	6.11	5.61	5.25	4.99	4.78	4.62
7.50- 7.99	13.46	8.97	7.38	6.53	5.99	5.62	5.33	5.11	4.94
8.00- 8.49	14.33	9.55	7.85	6.95	6.38	5.98	5.68	5.44	5.25
8.50- 8.99	15.20	10.13	8.33	7.37	6.77	6.34	6.02	5.77	5.57
9.00- 9.49	16.07	10.71	8.81	7.79	7.15	6.70	6.37	6.10	5.89
9.50-10.49	17.37	11.58	9.52	8.43	7.73	7.25	6.88	6.60	6.37
10.50-11.49	19.11	12.74	10.47	9.27	8.51	7.97	7.57	7.28	7.00
11.50-12.49	20.84	13.90	11.42	10.11	9.28	8.70	8.26	7.92	7.64
13	22.58	15.05	12.38	10.95	10.05	9.42	8.95	8.58	8.28
14	24.32	16.21	13.33	11.80	10.83	10.15	9.64	9.24	8.92
15	26.05	17.37	14.28	12.64	11.60	10.87	10.33	9.90	9.55
16	27.79	18.53	15.23	13.48	12.37	11.60	11.01	10.56	10.19
17	29.53	19.69	16.18	14.32	13.15	12.32	11.70	11.22	10.83
18	31.27	20.84	17.14	15.17	13.92	13.05	12.39	11.88	11.46
19	33.00	22.00	18.09	16.01	14.69	13.77	13.08	12.54	12.10
20	34.74	23.16	19.04	16.85	15.47	14.50	13.77	13.20	12.74
21	36.48	24.32	19.99	17.69	16.24	15.22	14.46	13.86	13.37
22	38.21	25.48	20.94	18.54	17.02	15.95	15.14	14.52	14.01
23	39.95	26.63	21.90	19.38	17.79	16.67	15.83	15.18	14.65
24	41.69	27.79	22.85	20.22	18.56	17.40	16.52	15.84	15.28
25	43.42	28.95	23.80	21.06	19.34	18.12	17.21	16.50	15.92
26	45.16	30.11	24.75	21.91	20.11	18.85	17.90	17.16	16.56
27	46.90	31.27	25.70	22.75	20.88	19.57	18.59	17.82	17.19
28	48.63	32.42	26.66	23.59	21.66	20.29	19.27	18.48	17.83
29	50.37	33.58	27.61	24.44	22.43	21.02	19.96	19.14	18.47
30	52.11	34.74	28.56	25.28	23.20	21.74	20.65	19.80	19.10
31	53.85	35.90	29.51	26.12	23.98	22.47	21.34	20.46	19.74
32	55.58	37.06	30.46	26.96	24.75	23.19	22.03	21.12	20.38
33	57.32	38.21	31.42	27.81	25.52	23.92	22.72	21.78	21.01
34	59.06	39.37	32.37	28.65	26.30	24.64	23.40	22.44	21.65
35	60.79	40.53	33.32	29.49	27.07	25.37	24.09	23.10	22.29
36	62.53	41.69	34.27	30.33	27.84	26.09	24.78	23.76	22.92
37	64.27	42.85	35.22	31.18	28.62	26.82	25.47	24.42	23.56
38	66.00	44.00	36.17	32.02	29.39	27.54	26.16	25.08	24.20
39	67.74	45.16	37.13	32.86	30.16	28.27	26.85	25.74	24.84
40	69.48	46.32	38.08	33.70	30.94	28.99	27.53	26.40	25.47

Table II—Maximum Permissible Individual Error—Continued

Range*	SUB-GROUP SIZE								
	2	3	4	5	6	7	8	9	10
41	71.21	47.48	39.03	34.55	31.71	29.72	28.22	27.05	26.11
42	72.95	48.63	39.98	35.39	32.48	30.44	28.91	27.73	26.75
43	74.69	49.79	40.93	36.23	33.26	31.17	29.60	28.38	27.38
44	76.43	50.95	41.89	37.07	34.03	31.89	30.29	29.04	28.02
45	78.16	52.11	42.84	37.92	34.80	32.62	30.98	29.70	28.66
46	79.90	53.27	43.79	38.76	35.58	33.34	31.66	30.36	29.29
47	81.64	54.42	44.74	39.60	36.35	34.07	32.35	31.02	29.93
48	83.37	55.58	45.69	40.44	37.12	34.79	33.04	31.68	30.57
49	85.11	56.74	46.65	41.29	37.90	35.52	33.73	32.34	31.20
50	86.85	57.90	47.60	42.13	38.67	36.24	34.42	33.00	31.84

* Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.

History: 1. Correctory amendment filed 1-26-61 as an emergency; designated effective 1-29-61. Certificate of compliance included (Register 61, No. 2).
2. Amendment of subsection (d) filed 8-25-70; effective thirtieth day thereafter (Register 70, No. 35).

2933.3.11. (Step 11.) Total Error. Recalculate a new total error and a new average error by the procedure outlined in Step 8 and Step 9. (See Example II).

(Note: In Example II, the minus 8 error is circled and discarded. The replacement package has a minus 3 error.)

Example II

	Errors		Range
		+ & 0	
Sub-Group No. 1	1 3 1 1 3	.. ..	 2
Sub-Group No. 2	2 3 (8) ..	1 2 1	.. .. ~~10~~ 5
Sub-Group No. 3	2	0 0 0 0	 2
Totals	~~-21~~	~~+4~~	~~11~~
Corrected Totals	−16	+4	9

Corrected total error.....(−16) + (4) = −12

Corrected average range.....(9 ÷ 3) = 3.00

The individual unreasonable errors, both plus and minus, are excluded from the average, because they are acted upon individually and because their inclusion could destroy or alter the packaging pattern. For instance: A sample of ten (10) packages could show nine (9) packages each with a minus error of 1, and one package with a plus error of 9. If the large plus error is included, the total error is 0. Obviously, the pattern of the sample is a minus 1 per package.

2933.3.12. (Step 12.) *Preliminary Determination.* (a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

(b) If the total error obtained from the sample is less than the above-determined value, and the error is minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

Table III—Value to Be Used to Indicate a Possible Shortage**

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
0.01- 0.19	.22	.27	.35	.39	.45	.50	.55	.77	1.10
0.20- 0.39	.67	.82	1.06	1.16	1.34	1.50	1.64	2.32	3.29
0.40- 0.59	1.12	1.37	1.77	1.94	2.24	2.50	2.74	3.87	5.48
0.60- 0.79	1.57	1.92	2.48	2.71	3.13	3.50	3.83	5.42	7.67
0.80- 0.99	2.01	2.47	3.18	3.49	4.03	4.50	4.93	6.97	9.86
1.00- 1.24	2.52	3.08	3.98	4.36	5.03	5.63	6.16	8.72	12.33
1.25- 1.49	3.07	3.77	4.86	5.33	6.15	6.88	7.53	10.65	15.06
1.50- 1.74	3.63	4.45	5.75	6.29	7.27	8.13	8.90	12.59	17.80
1.75- 1.99	4.19	5.14	6.63	7.26	8.39	9.38	10.27	14.53	20.54
2.00- 2.24	4.75	5.82	7.51	8.23	9.50	10.63	11.64	16.46	23.28
2.25- 2.49	5.31	6.50	8.40	9.20	10.62	11.88	13.01	18.40	26.02
2.50- 2.74	5.87	7.19	9.28	10.17	11.74	13.13	14.38	20.34	28.76
2.75- 2.99	6.43	7.87	10.17	11.14	12.86	14.38	15.75	22.27	31.50
3.00- 3.24	6.99	8.56	11.05	12.10	13.98	15.63	17.12	24.21	34.24
3.25- 3.49	7.55	9.24	11.93	13.07	15.10	16.88	18.49	26.15	36.98
3.50- 3.74	8.11	9.93	12.82	14.04	16.21	18.13	19.86	28.08	39.71
3.75- 3.99	8.67	10.61	13.70	15.01	17.33	19.38	21.23	30.02	42.45
4.00- 4.24	9.22	11.30	14.59	15.98	18.45	20.63	22.60	31.96	45.19
4.25- 4.49	9.78	11.98	15.47	16.95	19.57	21.88	23.97	33.89	47.93
4.50- 4.74	10.34	12.67	16.35	17.91	20.69	23.13	25.33	35.83	50.67
4.75- 4.99	10.90	13.35	17.24	18.88	21.80	24.38	26.70	37.77	53.41
5.00- 5.24	11.46	14.04	18.12	19.85	22.92	25.63	28.07	39.70	56.15
5.25- 5.49	12.02	14.72	19.01	20.82	24.04	26.88	29.44	41.64	58.89
5.50- 5.74	12.58	15.41	19.89	21.79	25.16	28.13	30.81	43.58	61.63
5.75- 5.99	13.14	16.09	20.77	22.76	26.28	29.38	32.18	45.51	64.36
6.00- 6.49	13.98	17.12	22.10	24.21	27.93	31.25	34.24	48.42	68.47
6.50- 6.99	15.10	18.49	23.87	26.15	30.19	33.75	36.98	52.29	73.95
7.00- 7.49	16.21	19.86	25.64	28.08	32.43	36.25	39.71	56.16	79.43
7.50- 7.99	17.33	21.23	27.40	30.02	34.66	38.75	42.45	60.04	84.91
8.00- 8.49	18.45	22.60	29.17	31.96	36.90	41.25	45.19	63.91	90.38
8.50- 8.99	19.57	23.97	30.94	33.89	39.14	43.75	47.93	67.78	95.86
9.00- 9.49	20.69	25.33	32.71	35.83	41.37	46.26	50.67	71.66	101.34
9.50-10.49	22.36	27.39	35.36	38.73	44.73	50.01	54.78	77.47	109.56
10.50-11.49	24.60	30.13	38.90	42.61	49.20	55.01	60.26	85.22	120.51
11.50-12.49	26.84	32.87	42.43	46.48	53.67	60.01	65.73	92.96	131.47
13	29.07	35.61	45.97	50.35	58.14	65.01	71.21	100.71	142.42
14	31.31	38.34	49.50	54.23	62.62	70.01	76.69	108.46	153.38
15	33.54	41.08	53.04	58.10	67.09	75.01	82.17	116.20	164.34
16	35.78	43.82	56.57	61.97	71.56	80.01	87.65	123.95	175.29
17	38.02	46.56	60.11	65.85	76.03	85.01	93.12	131.70	186.25
18	40.25	49.30	63.65	69.72	80.51	90.01	98.60	139.44	197.20
19	42.49	52.04	67.18	73.59	84.98	95.01	104.08	147.19	208.16
20	44.73	54.78	70.72	77.47	89.45	100.01	109.56	154.94	219.11
21	46.96	57.52	74.25	81.34	93.93	105.01	115.03	162.69	230.07
22	49.20	60.26	77.79	85.22	98.40	110.01	120.51	170.43	241.02
23	51.44	63.00	81.33	89.09	102.87	115.01	125.99	178.18	251.98
24	53.67	65.73	84.86	92.96	107.34	120.01	131.47	185.92	262.94
25	55.91	68.47	88.40	96.84	111.82	125.01	136.95	193.67	273.89
26	58.14	71.21	91.93	100.71	116.29	130.01	142.42	201.42	284.85
27	60.38	73.95	95.47	104.58	120.76	135.02	147.90	209.16	295.80
28	62.62	76.69	99.01	108.46	125.23	140.02	153.38	216.91	306.76
29	64.85	79.43	102.54	112.33	129.71	145.02	158.86	224.66	317.71
30	67.09	82.17	106.08	116.20	134.18	150.02	164.34	232.40	328.67
31	69.33	84.91	109.61	120.08	138.65	155.02	169.81	240.15	339.63
32	71.56	87.65	113.15	123.95	143.12	160.02	175.29	247.90	350.58
33	73.80	90.38	116.69	127.82	147.60	165.02	180.77	255.65	361.54
34	76.03	93.12	120.22	131.70	152.07	170.02	186.25	263.39	372.49
35	78.27	95.86	123.76	135.57	156.54	175.02	191.72	271.14	383.45
36	80.51	98.60	127.29	139.44	161.01	180.02	197.20	278.89	394.40
37	82.74	101.34	130.83	143.32	165.49	185.02	202.68	286.63	405.36
38	84.98	104.08	134.37	147.19	169.96	190.02	208.16	294.38	416.32
39	87.22	106.82	137.90	151.06	174.43	195.02	213.64	302.13	427.27
40	89.45	109.56	141.44	154.94	178.91	200.02	219.11	309.87	438.23

Table III—Value to Be Used to Indicate a Possible Shortage **.—Continued

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
41	91.69	112.30	144.97	158.81	183.38	205.02	224.59	317.62	449.18
42	93.93	115.03	148.51	162.68	187.85	210.02	230.07	325.37	460.14
43	96.16	117.77	152.04	166.56	192.32	215.02	235.55	333.11	471.09
44	98.40	120.51	155.58	170.43	196.80	220.02	241.02	340.86	482.05
45	100.63	123.25	159.12	174.30	201.27	225.03	246.50	348.61	493.01
46	102.87	125.99	162.65	178.18	205.74	230.03	251.98	356.35	503.96
47	105.11	128.73	166.19	182.05	210.21	235.03	257.46	364.10	514.92
48	107.34	131.47	169.72	185.92	214.69	240.03	262.94	371.85	525.87
49	109.58	134.21	173.26	189.80	219.16	245.03	268.41	379.59	536.83
50	111.82	136.95	176.80	193.67	223.63	250.03	273.89	387.34	547.78

* Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.
** Based on sub-sample sizes of 5.

Table IV—Correction Factors

Percent of lot sampled	Correction factor	Percent of lot sampled	Correction factor	Percent of lot sampled	Correction factor
1	.99	34	.81	68	.57
2	.99	35	.81	69	.56
3	.98	36	.80	70	.55
4	.98	37	.79	71	.54
5	.97	38	.79	72	.53
6	.97	39	.78	73	.52
7	.96	40	.77	74	.51
8	.96	41	.77	75	.50
9	.95	42	.76	76	.49
10	.95	43	.75	77	.48
11	.94	44	.75	78	.47
12	.94	45	.74	79	.46
13	.93	46	.73	80	.45
14	.93	47	.73	81	.44
15	.92	48	.72	82	.42
16	.92	49	.71	83	.41
17	.91	50	.71	84	.40
18	.91	51	.70	85	.39
19	.90	52	.69	86	.37
20	.89	53	.69	87	.36
21	.89	54	.68	88	.35
22	.88	55	.67	89	.33
23	.88	56	.66	90	.32
24	.87	57	.66	91	.30
25	.87	58	.65	92	.28
26	.86	59	.64	93	.26
27	.85	60	.63	94	.24
28	.85	61	.62	95	.22
29	.84	62	.62	96	.20
30	.84	63	.61	97	.17
31	.83	64	.60	98	.14
32	.83	65	.59	99	.10
33	.82	66	.58	100	0
		67	.57		

Table V—Maximum Permissible Total Error **

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
0.01-0.19	.42	.52	.67	.73	.84	.94	1.03	1.46	2.06
0.20-0.39	1.26	1.55	2.00	2.19	2.53	2.83	3.10	4.38	6.19
0.40-0.59	2.11	2.58	3.33	3.65	4.21	4.71	5.16	7.30	10.32
0.60-0.79	2.95	3.61	4.66	5.11	5.90	6.60	7.23	10.22	14.45
0.80-0.99	3.79	4.65	6.00	6.57	7.59	8.48	9.29	13.14	18.58
1.00-1.24	4.74	5.81	7.50	8.21	9.48	10.60	11.61	16.42	23.23
1.25-1.49	5.79	7.10	9.16	10.04	11.59	12.96	14.19	20.07	28.39
1.50-1.74	6.85	8.39	10.83	11.86	13.70	15.31	16.77	23.72	33.55
1.75-1.99	7.90	9.68	12.49	13.69	15.80	17.67	19.36	27.37	38.71
2.00-2.24	8.96	10.97	14.16	15.51	17.91	20.03	21.94	31.02	43.87
2.25-2.49	10.01	12.26	15.83	17.34	20.02	22.38	24.52	34.67	49.03
2.50-2.74	11.06	13.55	17.49	19.16	22.13	24.74	27.10	38.32	54.20
2.75-2.99	12.12	14.84	19.16	20.99	24.23	27.09	29.68	41.97	59.36
3.00-3.24	13.17	16.13	20.82	22.81	26.34	29.45	32.26	45.62	64.52
3.25-3.49	14.22	17.42	22.49	24.64	28.45	31.80	34.84	49.27	69.68
3.50-3.74	15.28	18.71	24.16	26.46	30.55	34.16	37.42	52.92	74.84
3.75-3.99	16.33	20.00	25.82	28.29	32.66	36.52	40.00	56.57	80.00
4.00-4.24	17.38	21.29	27.49	30.11	34.77	38.87	42.58	60.22	85.16
4.25-4.49	18.44	22.58	29.15	31.94	36.88	41.23	45.16	63.87	90.33
4.50-4.74	19.49	23.87	30.82	33.76	38.98	43.58	47.74	67.52	95.49
4.75-4.99	20.54	25.16	32.48	35.58	41.09	45.94	50.32	71.17	100.65
5.00-5.24	21.60	26.45	34.15	37.41	43.20	48.30	52.91	74.82	105.81
5.25-5.49	22.65	27.74	35.82	39.23	45.30	50.65	55.49	78.47	110.97
5.50-5.74	23.71	29.03	37.48	41.06	47.41	53.01	58.07	82.12	116.13
5.75-5.99	24.76	30.32	39.15	42.88	49.52	55.36	60.65	85.77	121.29
6.00-6.49	26.34	32.26	41.65	45.62	52.68	58.90	64.52	91.24	129.04
6.50-6.99	28.45	34.84	44.98	49.27	56.89	63.61	69.68	98.54	139.36
7.00-7.49	30.55	37.42	48.31	52.92	61.11	68.32	74.84	105.84	149.68
7.50-7.99	32.66	40.00	51.64	56.57	65.32	73.03	80.00	113.14	160.01
8.00-8.49	34.77	42.58	54.97	60.22	69.54	77.74	85.16	120.44	170.33
8.50-8.99	36.88	45.16	58.31	63.87	73.75	82.46	90.33	127.74	180.65
9.00-9.49	38.98	47.74	61.64	67.52	77.97	87.17	95.49	135.04	190.97
9.50-10.49	42.14	51.61	66.63	72.99	84.29	94.24	103.23	145.99	206.46
10.50-11.49	46.36	56.78	73.30	80.29	92.72	103.66	113.55	160.59	227.11
11.50-12.49	50.57	61.94	79.96	87.59	101.14	113.08	123.88	175.19	247.75
13	54.79	67.10	86.62	94.89	109.57	122.51	134.20	189.79	268.40
14	59.00	72.26	93.29	102.19	118.00	131.93	144.52	204.38	289.04
15	63.22	77.42	99.95	109.49	126.43	141.35	154.84	218.98	309.69
16	67.43	82.58	106.62	116.79	134.86	150.78	165.17	233.58	330.34
17	71.64	87.75	113.28	124.09	143.29	160.20	175.49	248.18	350.98
18	75.86	92.91	119.94	131.39	151.72	169.62	185.81	262.78	371.63
19	80.07	98.07	126.61	138.69	160.14	179.05	196.14	277.38	392.27
20	84.29	103.23	133.27	145.99	168.57	188.47	206.46	291.98	412.92
21	88.50	108.39	139.93	153.29	177.00	197.89	216.78	306.58	433.56
22	92.72	113.55	146.60	160.59	185.43	207.32	227.11	321.18	454.21
23	96 93	118.71	153.26	167.89	193.86	216.74	237.43	335.77	474.86
24	101.14	123.88	159.92	175.19	202.29	226.16	247.75	350.37	495.50
25	105.36	129.04	166.59	182.49	210.72	235.59	258.07	364.97	516.15
26	109.57	134.20	173.25	189.79	219.15	245.01	268.40	379.57	536.79
27	113.79	139.36	179.91	197.08	227.57	254.44	278.72	394.17	557.44
28	118.00	144.52	186.58	204.38	236.00	263.86	289.04	408.77	578.09
29	122.22	149.68	193.24	211.68	244.43	273.28	299.37	423.37	598.73
30	126.43	154.84	199.90	218.98	252.86	282.71	309.69	437.97	619.38
31	130.64	160.01	206.57	226.28	261.29	292.13	320.01	452.57	640.02
32	134.86	165.17	213.23	233.58	269.72	301.55	330.34	467.16	660.67
33	139.07	170.33	219.89	240.88	278.15	310.98	340.66	481.76	681.32
34	143.29	175.49	226.56	248.18	286.57	320.40	350.98	496.36	701.96
35	147.50	180.65	233.22	255.48	295.00	329.82	361.30	510.96	722.61
36	151.72	185.81	239.88	262.78	303.43	339.25	371.63	525.56	743.25
37	155.93	190.97	246.55	270.08	311.86	348.67	381.95	540.16	763.90
38	160.14	196.13	253.21	277.38	320.29	358.09	392.27	554.76	784.55
39	164.36	201.30	259.87	284.68	328.72	367.52	402.60	569.36	805.19
40	168.57	206.46	266.54	291.98	337.15	376.94	412.92	583.96	825.84

Table V—Maximum Permissible Total Error ••—Continued

Range*	SAMPLE SIZE								
	10	15	25	30	40	50	60	120	240
41	172.79	211.62	273.20	299.28	345.58	386.37	423.24	598.55	846.48
42	177.00	216.78	279.86	306.58	354.00	395.79	433.56	613.15	867.13
43	181.00	221.94	286.53	313.88	362.43	405.21	443.89	627.75	887.78
44	185.43	227.11	293.19	321.18	370.86	414.64	454.21	642.35	908.42
45	189.65	232.27	299.86	328.47	379.29	424.06	464.53	656.95	929.07
46	193.86	237.43	306.52	335.77	387.72	433.48	474.86	671.55	949.71
47	198.07	242.59	313.18	343.07	396.15	442.91	485.18	686.15	970.36
48	202.29	247.75	319.85	350.37	404.58	452.33	495.50	700.75	991.01
49	206.50	252.91	326.51	357.67	413.00	461.75	505.83	715.35	1011.65
50	210.72	258.07	333.17	364.97	421.43	471.18	516.15	729.94	1032.30

* Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.
•• Based on sub-sample sizes of 5.

If the total minus error as obtained from the sample is greater than the value determined from Table III after applying correction factor and is less than the value shown in Table V it shall be presumed that a shortage exists in the lot, and additional samples shall be taken before taking official action. When additional samples are taken these shall be included with the original sample, excluding any packages having unreasonable individual errors, and the combination shall be treated as a single sample, and the procedure as set forth in Sections 2933.3.8 to 2933.3.11 shall be followed.

Final Determination

If, however, the total error as obtained from the sample exceeds the permissible total error as determined from Table V, with correction factor applied as above, and this is also unreasonable under the provisions of Section 12612 of the Business and Professions Code, then it is deemed that a definite shortage exists and appropriate action shall be taken according to the

provisions of Section 12211, Division 5, Chapter 2, Article 2 of the Business and Professions Code.

(*Example:* Since, in the examples previously used the lot size was 200 and the sample size 15 the percentage is 7½ percent (15 ÷ 200 × 100) and, therefore, from Table IV the correction factor is .96. Furthermore, from the Example II, the average range is 3.00 and the corresponding value from Table III is 8.56 for a sample size of 15. Then, 8.56 multiplied by .96 equals 8.22. This is the value to be used to indicate a possible shortage, based upon Table III. This also means that any minus total error obtained from the sample must not exceed minus 8.22 for the lot to be acceptable. In Example II the Corrected Total Error is minus 12, which exceeds minus 8.22, so therefore the lot continues to be of doubtful acceptability. The total permissible error for Example II is 15.48, or the value of 16.13 from Table V for the range of 3.00 and sample size of 15, times .96, the correction factor from Table IV. Since the Corrected Total Error of Example II is minus 12, which is less than 15.48, it cannot be presumed a definite shortage exists.)

(*Example:* Therefore the status of the lot in this example has not been ascertained definitely by these procedures, and the decision to continue sampling until a definite conclusion can be reached depends upon the discretion of the weights and measures official.)

(c) All packages having a minus error greater than the unreasonable individual error as determined in Section 2933.3.10, and also unreasonable under the provisions of Section 12612 of the Business and Professions Code, shall be held to be in violation and appropriate action shall be taken with regard to these individual packages.

History: 1. Amendment of subsections (b) and (c) filed 8-25-70; effective thirtieth day thereafter (Register 70, No. 35).

2933.3.13. *Procedure to Be Used.* The procedure stated herein shall be used unless the average net content of the lot is determined by 100 percent sampling (weighing, measuring, or counting the contents of all of the packages in the lot). The "Sample Sizes" as specified in Table I of this procedure shall be considered as the minimum sample size for a given lot size, and at the sealer's discretion, may be increased for a given lot size from Table I.

However, the acceptance criteria as set forth in Section 2933.3.12 are to apply in determining appropriate action. Furthermore, packages found to have individual unreasonable errors as determined by Section 2933.3.10 shall be excluded from the calculations of the lot average when using a 100 percent sample.

2933.3.14. *Range Variation Data.* The Department shall accumulate information and data pertaining to the weight, measure or count range variations of prepackaged commodities and may establish upper and lower control limits to prevent the manipulation of the range factor by any person, firm or corporation.

Procedure: Commodities Sold by Volume
in "Standard-Pack" or "Random-Pack" Packages

2933.3.20. *Procedures for Commodities Sold by Volume in Standard-Pack or Random-Pack.* All of the procedures set forth in Section 2933.3 through and including Section 2933.3.13 of this Article shall apply to this procedure.

Article 5.1. Procedures to Determine Accuracy of Net Weight Statements for Packaged Meat and Meat Products and Poultry and Poultry Products, and Required Action for Short Weight Packages

2940. *Application of Article.* (a) This Article shall apply only during proceedings in the cases of *Rath Packing Company vs. Becker, et al.* and *Rath Packing Company vs. People of the State of California, et al.*, Nos. 72-607-R and 72-608-R, respectively, United States District Court, Central District of California. This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of meat and meat products and poultry and poultry products.

(b) This Article is based on the director's interpretation of applicable law that:

(1) Weight statements placed on packages of meat and meat products and poultry and poultry products by the packager are intended to, and do, represent to the purchaser that the usable contents of the package at the time of purchase is equal to the label weight and the purchaser is entitled to rely on that representation;

(2) The State of California has a responsibility to mark off sale packages which contain less

usable product at time of retail sale than is represented by the label weight; and

(3) Permitting the sale of packages which contain less usable product than the label weight promotes unfair competition among processors.

NOTE: Authority cited: Sections 12027 and 12609, Business and Professions Code. Reference: Sections 12024, 12024.5, 12601, 12603 and 12607, Business and Professions Code.

History: 1. New Article 5.1 (Sections 2940, 2940.1, and 2940.2) filed 4-19-73 as an emergency; effective upon filing (Register 73, No. 16).

2. Certificate of Compliance filed 8-16-73 (Register 73, No. 33).

2940.1. *Package Inspection.* (a) Each sealer of weights and measures shall, within his county, inspect packages of meat and meat products and poultry and poultry products to determine whether the label weight stated on the package is accurate at time of inspection.

(b) The determination of accuracy shall be made by weighing all of the usable product within the container, exclusive of wrappers and packing substances.

(c) As an alternate procedure to the procedure stated in subsection (b), the sealer of weights and measures shall establish an accurate tare weight for the containers within a lot of packages and weigh each of the inspected packages. He shall:

(1) Remove 3 packages from the lot at random and weigh each of the unopened packages;

(2) Remove from each of the 3 containers all of the usable product, exclusive of wrappers and packing substances; and

(3) Determine the tare weight for each of the 3 packages separately by subtracting the weight of the usable product from the gross weight.

He shall weigh separately each of the packages in the lot to be inspected and apply as a tare weight for purposes of the lot the lowest tare weight obtained by the above procedure.

(d) For purposes of the procedure specified in subsection (c), a lot is defined as a group of packages assembled in one place, of the same product and brand, in apparently identical containers, bearing the same statement of weight.

2940.2. *Off Sale Procedures.* (a) The sealer of weights and measures shall order off sale all packages which are found to be short weight under either procedure stated in Section 2940.1. He shall record on a form specified by the director the shortage determined for each package marked off sale.

(b) He shall attach to such packages a notice that they may not again be placed on sale until an accurate statement of weight is placed on each package.

Federal Food, Drug, and Cosmetic Act,
52 Stat. 1047, 21 U.S.C.

§ 343. *Misbranded food*

A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular. . . . .

(e) If in package form unless it bears a label containing (1) the name and place of business of

the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

Federal Wholesome Meat Act,
81 Stat. 584, 600, 21 U.S.C.

§ 601. *Definitions*

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular; . . . .

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary;

§ 678. *Non-Federal jurisdiction of Federally regulated matters; prohibition of additional or different requirements for establishments with inspection serv-*

ices and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

* * *

Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment. . . . .

9 Code of Federal Regulations,
Section 1.8b(q), Page 17.

The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

21 Code of Federal Regulations,
Section 317.2(h)(2), Page 503.

The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

Memorandum Order.

United States Court of Appeals, Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January, one thousand nine hundred and seventy-five.

Present: Hon. Irving R. Kaufman, Chief Judge.

Hon. Wilfred Feinberg, Hon. Walter R. Mansfield, Circuit Judges.

General Mills, Inc., a corporation, The Pillsbury Company, a corporation, Seaboard Allied Milling Corporation, a corporation, Plaintiffs-Appellants v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York, Defendant-Appellee. 74-2039.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments and order of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Cerk
By: /s/ Vincent A. Carlen
Chief Deputy Clerk

United States District Court, Southern District of New York.

General Mills, Inc., a Corporation; The Pillsbury Company, a Corporation; Seaboard Allied Milling Corporation, a Corporation, Plaintiffs, v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York, Defendant. 73 Civ. 2497.

OPINION

Plaintiffs, who are manufacturers and packagers of wheat flour, bring this action for a declaratory judgment. Jurisdiction is based on 28 U.S.C. §§ 1331(a), 1332(a), 1337.

They have moved for a preliminary injunction against the Commissioner of Consumer Affairs, City of New York, to restrain the enforcement of Section 833-16.0 of the Administrative Code of the City of New York against their flour products on the ground that the ordinance is preempted by the federal Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451, et seq., and the Foods, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq*. violates Due Process, and imposes a burden on interstate commerce. The Commissioner of Consumer Affairs in turn moves for summary judgment.

Oral argument was heard on both motions on January 28, 1974. The court denies plaintiffs' motion for a preliminary injunction and grants defendant's motion for summary judgment in part.

Inspectors of the Department of Consumer Affairs have visited several retailers and have issued violations for packages the contents of which weighed less than the five pounds marked on the packages.

The parties agree that flour is a hygroscopic substance, that is, its moisture content fluctuates with changes in the moisture level of the surrounding atmosphere.

The federal Fair Packaging and Labeling Act prohibits the distribution in interstate commerce of packaged consumer commodities unless in conformity with regulations enacted pursuant to section 1455 and unless "[t]he net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label. . . ." 15 U.S.C. § 1453(a).

The federal regulations provide that

> "[t]he declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 15 C.F.R. § 1.8b(q).

The federal Food, Drug and Cosmetic Act similarly prohibits the introduction or delivery for introduction into interstate commerce of any food that is misbranded. 21 U.S.C. § 331(a). The Act further provides that food packages are misbranded unless they contain an accurate statement of the quantity of the contents, provided that ". . . reasonable variations shall be permitted . . ." by regulation. 21 U.S.C. §343(e).

Finally, Section 833-16.0 of the Administrative Code of the City of New York provides in pertinent part:

> "It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . . ."

Plaintiffs claim that the ordinance does not permit reasonable weight variations resulting from loss of moisture. Defendant, on the other hand, argues that, like the applicable federal statutes, the ordinance does allow for reasonable variations.

The court agrees with defendant's interpretation of the ordinance. *See Emerald Packing Corp. v. Hygrado Food Products,* 200 N.Y.S.2d 534, 23 Misc.2d 915 (App. Div. 1st Dept. 1960).

Defendant further argues that the Department treats variations from a table of "unreasonable minus or plus errors" contained in a handbook prepared by the U.S. Department of Commerce, National Bureau of Standards, (Handbook 67 National Bureau of Standards, Exhibit A, attached to Answer), as prima facie violations. The manual was intended for use by state and local weights and measures officials and describes "a method for controlling various types of pre-packaged commodities." (Handbook 67, p. 1).

According to defendant, once a prima facie violation of § 833-16.0 is found, the burden is placed on the retailer to show that the shortweight errors were unavoidable and caused by ordinary and customary exposure to conditions that normally occur in good distribution practice.

Standing

Plaintiffs have standing to bring this action even though the violations complained of have been issued against retailers who are not before the court.

In order to have standing, a party must allege ". . . that the challenged action has caused him injury in fact, economic or otherwise." Moreover, it must appear that the interest sought to be protected by the plaintiff is arguably within the zone of interests regulated by statute or the Constitution. *Data Processing Service v. Camp,* 397 U.S. 150 (1970).

Plaintiffs in this action have alleged that defendant's actions have damaged their reputations among retailers and the general public. (Complaint, ¶29). Moreover, it is arguable that plaintiffs are within the "one or more interests regulated by the Constitution and federal statute.

Summary Judgment

There does not seem to be any dispute that defendant's inspectors issue violations only when the flour packages' weight shortages are more than 3/8ths of an ounce, the amount of error said to be unreasonable in Handbook 67, pp. 7-8. (Defendant's Statement Pursuant to Rule 9(g), ¶5).[1]

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[1]Plaintiffs deny Paragraph 5 of Defendant's Rule 9(g) statement to the extent it is inconsistent with paragraphs 28, 29 and 30 of their Rule 9(g) statement. Plaintiffs' Statement Pursuant to Rule 9(g), 135. In paragraphs 28-30, and the affidavit referred to therein, however, plaintiffs merely allege that defendant has misinterpreted Handbook 67 and should not have used the table of "errors", which appears at p. 8, as a guide to the reasonableness of weight variations resulting from changes in moisture content.

Therefore, the court will assume that defendant's inspectors make some allowance for variations in net weight.

The court will now consider each of plaintiffs' constitutional and statutory claims.

1. *Commerce Clause*

The court holds that the commerce clause does not forbid state and local regulation of weights and measures of packages which have been transported in interstate commerce for the reasons stated in Judge Friendly's opinion in *Swift & Company v. Wickham,* 230 F.Supp. 398, 402-03 (S.D.N.Y. 1964) (three-judge court), *aff'd* 364 F.2d 241 (2d Cir. 1966), *cert. denied,* 385 U.S. 1036 (1967). The framers of the Constitution did not intend to preclude state or municipal regulations of weights and measures, "one of the oldest exercises of governmental regulatory power." *Id.* at 402.

However, if may be that the city ordinance, as enforced by defendant, unduly burdens interstate commerce and is, therefore, unconstitutional. *See Florida Avocado Growers v. Paul,* 373 U.S. 132, 152-156 (1963).

Plaintiffs will, therefore, be permitted, on the trial of the permanent injunction, to prove that the city ordinance is unnecessarily burdensome. In this connection, they would have to prove first that the ordinance, as it is enforced, imposes standards substantially more stringent than those of the applicable federal laws. Furthermore, plaintiffs would have to prove that the municipal requirements exceed the limits necessary to vindicate legitimate local interests, unreasonably favor

local producers, or constitute an illegitimate attempt to control the conduct of packages beyond the borders of New York. *See Florida Avocado Growers, supra,* at 154.

2. *Due Process*

There is no merit to plaintiffs' claim that defendant, by failing to allow for reasonable variations from the stated net weight of the packages, has violated their right to due process guaranteed by the Fourteenth Amendment.

". . . [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.,* 304 U.S. 144, 152 (1933).

Defendant, charged by N.Y. Agriculture and Markets Law, § 183, and Administrative Code of the City of New York, § 833-21.0, with the responsibility of determining whether violations should be issued pursuant to applicable municipal ordinances and state statutes prohibiting unreasonable weight variations, could have rationally concluded that, ordinarily, weight variations greater that those indicated on p. 8 of Handbook 67 were unjustified. Neither procedural nor substantive due process requires absolute certainty to support the issues of a violation.

3. *Applicable Federal Statutes*

Finally, the court holds that the municipal ordinance is not preempted by either the federal Fair Packaging

and Labeling Act or the Food, Drug and Cosmetic Act.

" '[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Florida Avocado Growers, supra,* at 142.

Compliance with both federal and local regulations is not a physical impossibility and, therefore, the nature of the regulated subject matter does not require a conclusion that the federal regulations preempt the local ordinance.

There would seem to be an irreconcilable conflict only if the local ordinance required plaintiffs to do something which the federal statutes and regulations prohibited.

This would be the case if, in order to comply with the local ordinance, plaintiffs were required to overfill their packages in order to compensate for inevitable moisture losses, in amounts that would place them in violation of the federal statutes and regulations.

However, as plaintiffs have argued, federal law permits reasonable variations from stated weights. Plaintiffs have not offered any support for their argument that overfills sufficient to avoid liability under the New York ordinance would be deemed unreasonable under the federal statutes and regulations.

Finally, Congress has not manifested an intention to preempt all ordinances relating to labeling of packages which have been in interstate commerce.

The Supreme Court has already held that the Food and Drug Act is not preemptive of state regulation. *Corn Products Ref. Co. v. Eddy*, 249 U.S. 427 (1919).

The Fair Packaging and Labeling Act provides:

> "It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." 15 U.S.C. § 1461.

The Conference report, in its explanation of this provision, quoted from the House of Representatives report as follows: state laws or regulations with respect to the labeling of net quantity of packages which impose ". . . inconsistent or less stringent requirements . . ." would be preempted. *U. S. Code Congressional and Administrative News*, 1966 p. 4094.

It, therefore, appears that Congress intended to preempt only those state laws or regulations which were *less stringent* or incompatible with the new federal statute. Since plaintiffs argue that the city ordinance is more stringent than the federal law and since the court has concluded that the two laws are not incompatible,[2] the municipal ordinance is not preempted.

The court accordingly grants defendant's motion for summary judgment in part. The trial of the permanent injunction will be limited to the issue of whether the

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[2]See pp. 9-10, *supra*.

municipal ordinance unduly burdens interstate commerce.

Preliminary Injunction

The two-fold requirement for a preliminary injunction is a demonstration of probability of success on the merits and a showing that irreparable harm will result if such relief is denied, *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc.*, 476 F.2d 687 (2d Cir. 1973), or that serious questions are raised and the balance of hardships tips sharply in plaintiffs' favor. *Charlie's Girls, Inc. v. Revlon, Inc.*, ... F.2d ....., Docket No. 73-2002 (2d Cir., decided Aug. 30, 1973).

In view of this court's disposition of defendant's summary judgment motion, plaintiffs will prevail on the merits only if they can prove that Section 833-16.0 of the Administrative Code of the City of New York unduly burdens interstate commerce. Plaintiffs have not made any showing that they will be able to meet that burden. Nor do the equities tip decidedly in plaintiffs' favor.

The motion for a preliminary injunction is accordingly denied.

Dated: New York, New York

February 22, 1974

CONSTANCE BAKER MOTLEY
U. S. D. J.

United States District Court, Southern District of New York.

General Mills, Inc., a Corporation; the Pillsbury Company, a Corporation; Seaboard Allied Milling Corporation, a Corporation, Plaintiffs, v. Betty Furness, Commissioner, Department of Consumer Affairs, City of New York, Defendant. 73 Civ. 2497.

Memorandum Opinion and Order

Plaintiffs, who are manufacturers and packagers of wheat flour, have brought this action for a declaratory judgment. Jurisdiction is based on 28 U.S.C. §§ 1331 (a), 1332(a) 1337.

Plaintiffs have requested injunctive relief against the Commissioner of Consumer Affairs, City of New York, to restrain the enforcement of Section 833-16.0 of the Administrative Code of the City of New York against retail distributors of their flour products.

The ordinance makes it ". . . unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof. . . ."

The essence of plaintiff's claim is that the city ordinance does not allow for reasonable weight variations resulting from inevitable losses of moisture and, therefore, violates Due Process and imposes a burden on interstate commerce. Plaintiffs also claim that the ordinance is preempted by the federal Fair Packaging and Labeling Act, 15 U.S.C. § 1451, *et seq.*, and the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301, *et seq.*

The court, in an opinion dated February 22, 1974, ruled that the ordinance did allow for reasonable weight variations resulting from moisture loss. The court also ruled that the ordinance, as applied, did not deny plaintiffs their rights under the Due Process Clause and that the Commerce Clause does not bar all state and local regulation of weights and measures of packages which have been transported in interstate commerce. The court denied plaintiffs' motion for preliminary injunction and granted defendant's motion for summary judgment, in part. The court limited trial of the permanent injunction to the question whether the city ordinance unnecessarily burden interstate commerce. It was ruled that plaintiffs would have to prove first that the ordinance, as applied, imposed standards substantially more stringent than those of applicable federal laws *and* that the municipal requirements exceeded the limits necessary to vindicate legitimate local interests, unreasonably favored local producers, or constituted an illegitimate attempt to control the conduct of packagers beyond the borders of New York State. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 154 (1963).

The trial of the permanent injunction was concluded on May 1, 1974. The court at that time denied plaintiffs' motion for a permanent injunction and granted defendant's motion to dismiss the complaint for the reasons herein.

It appears that the city ordinance is substantially more stringent than the applicable federal statutes, as applied. Both the city ordinance and federal regulation permit reasonable variations caused by loss of

moisture during the course of good distribution practice.[1]

However, plaintiffs offered testimony that federal inspectors do not examine packages on retailers' shelves. (Testimony of Malcolm Jensen). Since much of the moisture loss occurs after the packages leave the manufacturers' plants, examinations by city inspectors conducted at retail stores are likely to result in discoveries of moisture losses which federal inspectors do not detect.

Nevertheless, plaintiffs have not shown that the city ordinance is unnecessarily burdensome. There has been no showing that the ordinance's enforcement unreasonably favors local producers and plaintiffs have not shown that the municipal requirements exceed the limits necessary to vindicate legitimate local interests.

In view of a municipality's interest in regulating weights and measures, "one of the oldest exercises of governmental regulatory power," *Swift & Company v. Wickham,* 230 F. Supp. 398, 402 (S.D.N.Y. 1964) (three-judge court), *aff'd,* 364 F.2d 241 (2d Cir. 1966), *cert. denied,* 385 U.S. 1036 (1967), a city must be afforded wide discretion in determining what variations from stated weights are reasonable.

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[1]With regard to the city ordinance, see this court's opinion, dated February 22, 1974, at p. 4.

The federal regulation provides as follows:

> "The declaration of net quantity shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 21 C.F.R. 1.8b (q) (1973).

Plaintiffs' principal argument is that defendant, in issuing violations against retailers, mechanically applies a table of "unreasonable minus or plus errors" contained in a handbook prepared by the U.S. Department of Commerce, National Bureau of Standards, (Handbook 67, National Bureau of Standards, Exhibit A, attached to Answer). Plaintiffs contend that the table was not intended to apply to weight variations resulting from moisture losses and, therefore, does not make adequate allowance for such losses. However, it is not enough to show that defendant applies the table in a manner contrary to the intent of the handbook's author. The question, for purposes of the Commerce Clause, is whether the city's requirements exceed the limits necessary to vindicate its interest in protecting consumers from misleading labeling practices.

The handbook has no binding effect on states or municipalities since it merely describes "a method for controlling various types of pre-packaged commodities." (Handbook 67, p. 1). The question is whether the city is acting reasonably when it concludes that variations of the magnitude described in the table are ordinarily unjustified, bearing in mind that the table is only used to determine whether there has been a *prima facie* violation of the ordinance.

The court cannot find that the city is acting unreasonably when it issues violations based on weight variations in excess of those allowed in the table. As the court held in its opinion of February 22, 1974, the city could rationally conclude that ordinarily weight variations greater than those indicated in the table were unjustified. Such variations may be the result of factors other than moisture loss, such as under-fills by the

packagers or leaks in the packages. Variations may also be the result of excessive moisture losses resulting from poor distribution practices. An inspector cannot be required to determine, in advance of issuing a summons, whether a weight variation is impermissible. It is enough that after the summons is issued the retailer be afforded a reasonable opportunity to show that the weight variation was unavoidable.

In this connection, the city contends that when a violation is issued, the retailer is afforded an opportunity to meet informally with city officers to attempt to reach a settlement with the city. If a settlement cannot be reached or if a retailer fails to appear at the settlement conference, the city could commence civil proceedings to collect a penalty of $100 for each violation, Administrative Code of the City of New York, § 833-22.O, or criminal prosecutions, § 322.23.O. Plaintiffs have made no showing that the fact that weight variations resulted from inevitable moisture losses would not be recognized as a defense in such proceedings. They have, therefore, failed to show that the ordinance, as applied, exceeds the limits necessary to protect the city's legitimate interest in fair packaging.[2]

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[2]Plaintiffs have not argued that there is no legitimate interest in preventing excessive moisture losses, although they did argue, unsuccessfully, on the defendant's summary judgment motion, that the *city*, as opposed to the federal government, had no such legitimate interest.

It is arguable that there is no legitimate interest because the consumer can always add tap water to make up for excessive moisture losses. However, the consumer would ordinarily have no way of knowing that water could be added without diluting the mix. The city might rationally conclude that consumers who did not know that their flour packages were short-weighted as a result of moisture losses and that additional water could, therefore, be added to recipes without diluting the mix would, in order to meet their cooking needs, end up buying more flour than they would have if excessive moisture had not been lost.

It might be noted that the federal regulation also seems to proscribe variations from stated weight caused by excessive moisture losses. See p. 4, and n. 1, *supra*.

Finally, the court finds that the ordinance, as applied, does not constitute an illegitimate attempt to control the conduct of packagers beyond the borders of New York. The city has a legitimate interest in regulating weights and measures even though its regulations may inevitably require out-of-state packagers to alter their practices to conform to the local standards. So long as the city acts reasonably, such regulations do not unnecessarily burden interstate commerce.

Plaintiffs' motion for a permanent injunction is denied and defendant's motion to dismiss the complaint is granted.

Dated: New York, New York

July 2, 1974 So Ordered.

/s/ Constance Baker Motley
CONSTANCE BAKER MOTLEY
U.S.D.J.